SINCE DEPUIS 1919

JUSTICE

Vol.38 ACTUALITÉS - REPORT No.3

CANADIAN CRIMINAL JUSTICE ASSOCIATION - ASSOCIATION CANADIENNE DE JUSTICE PÉNALE

NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER (NCR)

GUEST EDITOR - DR. JOHN WINTERDYK

INTERNATIONAL PERSPECTIVES ON NCR

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NANCY WRIGHT, RÉDACTRICE EN CHEF DEPUIS 2012.
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Editorial citation: CJCCJ Book Review, Vol. 63.1, 2021: http://www.ccja-acjp.ca/pub/en/reviews/criminology-today-a-critical-assessment/"www.ccja-acjp.ca/pub/en/reviews/criminology-today-a-critical-assessment/

ISSN 2563-3449 (Print) ISSN 2563-3457 (Online)

DR. JOHN WINTERDYK - COVER PICTURE CREDIT: MOUNT ROYAL UNIVERSITY

LAYOUT BY MARTIN SPIELAUER

JUSTICE

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EDITORIAL

JOHN WINTERDYK, PHD
Guest Editor

In Canada, as in many parts of the world, the issues related to individuals with a mental illness who commit a crime are controversial and sometimes complicated. Not only are there different standards around the world for assessing an individual's mental capacity to be held responsible for their crime but, contrary to public perception, it is also rarely used as a defence. However, cases involving a designation of 'not criminally responsible' on account of a mental disorder typically receive notable media coverage.

This Special Issue brings together a range of national and international articles exploring the subject of not criminally responsible (NCR) from several perspectives. It is unique, to the best of the Guest Editor's knowledge, in being the first special issue on the topic.

As is the practice with the *Justice Report*, the articles are shorter than those in academic journals, but each contribution offers a rich, insightful, and thought-provoking discussion of NCR. The four international contributions offer insights into some of the challenges and controversies shrouding the NCR designation and provide unique recommendations for resolving some of the issues. The themes range from Dr. (iur.) Filip Vojta and Dr. (iur.) Anna Pingen's probe of the challenges facing the International Criminal Courts when confronted with NCR cases, to Christine Carney's exploration of the practices and challenges of NCR cases for Australia's Mental Health Courts. Doctor (iuris.) Stefan Schulz examines some of the legal and pragmatic issues surrounding NRC designations in Namibia, Dr. Purvi Pokhariyal and Deepa Dubey highlight NCR as a rarely used designation and a concept shrouded by lack of clarity and procedural challenges in India, while Dr. Nandor Knust explores Norway's medical model.

As with the international contributions, the four articles from Canada offer a unique perspective and cover a broad range of themes and issues that highlight the complexity and controversy surrounding the NCR designation here. These themes range from Dr. John Winterdyk's overview of the historical evolution of Canadian legislation on NCR, to Catharine Pandila's insightful commentary and reflection on the role and meaning of NCRMD in Canada. Nicholls and colleagues focus on women who are underrepresented in Canadian NCRMD designations and the challenges they face in receiving support and services. Meanwhile, forensic psychologist Dr. Andrew M. Haag discusses NCR from the perspective of a scientific practitioner and researcher working on the frontlines with persons being assessed for the applicability of Section 16.

Finally, I am indebted to all the contributors for their exceptional contributions and to the CCJA for making this venue available. I trust our efforts will invite further discourse and research on this controversial and crucial legal designation in Canada and internationally.

ÉDITORIAL

JOHN WINTERDYK, PHD
Rédacteur Invité

Au Canada, comme partout dans le monde, les problèmes liés aux individus atteints de maladies mentales ayant commis un crime sont controversés et parfois complexes. Différentes normes existent à travers le monde pour évaluer la capacité mentale d'une personne à être tenue responsable de son crime, mais, contrairement à la perception du public, elles sont rarement utilisées comme moyen de défense. Cependant, les cas de "non-responsabilité criminelle" pour cause de troubles mentaux sont généralement médiatisés de manière prééminente.

Ce numéro spécial rassemble un éventail d'articles nationaux et internationaux explorant le sujet de la non-responsabilité criminelle (NRC) sous plusieurs perspectives. Il est également unique, à la connaissance du rédacteur invité, étant le premier numéro spécial à ce sujet.

Bien que le Justice Report ne soit pas une publication académique et qu'il comporte des articles relativement courts, chaque contribution offre une discussion riche, perspicace et inspirante sur la non-responsabilité criminelle pour cause de troubles mentaux. Les quatre contributions internationales soulignent quelques défis et controverses entourant cette désignation et formulent des recommandations uniques pour résoudre certains de ces problèmes.

La gamme de thèmes s'étend de l'analyse de Dr. (iur.) Filip Vojta et Dr. (iur.) Anna Pingen sur les défis auxquels est confrontée la Cour pénale internationale dans les cas de non-responsabilité criminelle, à l'exploration de Christine Carney quant aux pratiques et aux difficultés de ces cas pour les tribunaux de santé mentale en Australie. Le Dr. (iuris.) Stefan Schulz examine certaines des questions juridiques et pragmatiques entourant ces désignations en Namibie, tandis que Dr. Purvi Pokhariyal et Deepa Dubey Stefan Schulz soulignent que la désignation est rarement utilisée et que le concept est miné par un manque de clarté et des défis procéduraux en Inde, tandis que le Dr. Nandor Knust explore le modèle médical de la Norvège.

Tout comme les contributions internationales, les quatre articles canadiens apportent un point de vue unique et leur large éventail de thèmes et de questions mettent en évidence la complexité et la controverse entourant cette désignation au Canada. Ces thèmes vont de la vue d'ensemble du Dr. John Winterdyk sur l'évolution historique de la législation canadienne, au commentaire éclairant de Catharine Pandila sur la signification et le rôle de cette désignation au Canada. Nicholls et ses collègues se concentrent sur les défis liés à l'accès aux services et au soutien pour les femmes, qui sont sous-représentées dans ces désignations au Canada. Le Dr. Andrew M. Haag, psychologue judiciaire, discute de la désignation du point de vue d'un praticien scientifique et d'un chercheur travaillant en première ligne avec des personnes dont l'applicabilité de l'article 16 est évaluée.

Enfin, je suis redevable à chacun des contributeurs pour leur contribution remarquable et envers l'ACJP pour avoir rendu cette publication possible. J'espère que nos efforts mèneront à plus de discussions et de recherches sur cette désignation juridique controversée et pertinente à l'échelle nationale et internationale.

Not Criminally Responsible: Myths, Realities, & Challenges

JOHN WINTERDYK[1]
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In this article, our Guest Editor Dr. John Winterdyk takes us back to Babylon in a fascinating overview of not criminally responsible (NCR) within a context of this special issue of the Justice Report. Informed by articles on various themes related to NCR, from a national and international perspective, this special issue offers an engaging debate around the complex and controversial NCR designation. While the topic is too complex to be comprehensively explored in this publication, Winterdyk points out that despite its history and (legal) discourse there are still several fundamental misconceptions around the NCR designation not only in Canada but worldwide, as illustrated in several of the articles in this Special Issue of the Justice Report. Noting that NCR verdicts make up less than one-tenth of one percent of adult criminal court cases in Canada annually, Winterdyk queries the principle of burden of proof for a designation that cannot be fully defined or operationalized. Winterdyk expresses the need for further discourse and scholarly research to inform future directions and policy around NCR while broadening public awareness.

One of the fascinating things about studying justice, crime, and criminality and associated concepts is that they are often not as straightforward as we imagine. As I often said in my introductory criminology classes, "'crime' is easy to spell but a complex problem". The terms 'justice', 'due process', and 'reasonable doubt', 'reasonable suspicion for investigation', 'plea bargaining', 'recidivism', and 'punishment', among many other legal and criminal justice terms, while seemingly simple are, in fact, complex and controversial legal terms and phrases that conjure up a diverse range of formal and informal responses and impressions.

Add the designation of not being criminally responsible (NCR) to this mix, even though there are comparatively very few cases each year. In a 2015 study, Statistics Canada found that NCR verdicts comprise less than one-tenth of one percent (i.e., fewer than 280 cases per year) of adult criminal court cases processed annually (Miladinovic & Lukassen, 2014)[2]. Yet, NCR cases tend to attract considerable media attention and conjure up negative emotions, which are often unjustified (see Meney, 2022). In 2013, four-time Emmy Award-winning Canadian documentary filmmaker John Kastner (1949-2019) produced 'NCR: Not criminally responsible'. This National Film Board documentary was based on the 1999 case of Sean Clifton, who stabbed (but did not kill) Julie Bouvier at a shopping mall in Cornwall, Ontario. Clifton was designated NCR based on a diagnosis of paranoid schizophrenia with obsessive-compulsive disorder. This mental health diagnosis made him unfit to stand trial.

Several high-profile/sensational Canadian cases[3] inspired this Special Issue of the *Justice Report*. These include Vincent Li in 2008; Luka Rocco Magnotta in 2012, whose case became the basis for a three- episode series on Netflix called 'Don't F**k with Cats: Hunting an Internet Killer'; the case of Alberta peace officer Rob Lazenby, also in 2012; the Alberta case of Mathew de Grood in 2014; and various exchanges with colleagues about the response to and public perceptions of the designation internationally[4]. The idea of editing a Special Issue on NCR was also motivated by the growing awareness of mental illness, especially with the onset of COVID-19 and increasing number of high-profile athletes (e.g., Canadian cyclists Clara Hughes & Hayley Smith) and various celebrities (e.g., Robin Williams & Canadian comedian Howie Mandel) to have publicly shared their struggles with mental health. Yet, as Meney (2022) cautions, "what we see and hear in the media may not always be an accurate representation."

Since the articles presented in this Special Issue cover a range of themes related to NCR from a national and international perspective, I will limit this article to a broader contextual overview to situate the articles. Yet, as with any attempt to ensure comprehensive coverage of any criminological, criminal justice, or legal construct, and especially given the parameters for length of this publication, it is impossible. However, an effort was made to offer an informed debate around the complex and, at times, controversial designation of not criminally responsible.

THE '*EVOLUTION*' OF THE NCR DEFENCE-DIAGNOSIS

Like many concepts in the criminal justice and legal system, the concept and designation of' not criminally responsible' has had an interesting trajectory in Canada.

Section 16 of Canada's Criminal Code, as will be discussed more broadly throughout this issue by the other Canadian contributors, is the section that pertains to 'defense of mental disorder' (see Section 16 of the CCC, below). In the aftermath of the landmark case R. v. Swain in 1992 the Criminal Code (i.e., Bill C- 30) introduced some notable amendments to the mental disorder regime (for further details, see Lacroix et al., 2017, and Haag in the issue). As Pyzer (2010) observed, the "underlying premise of the Bill was to modernize the psychiatric terminology used in the old Bill and to reform the powers of the Mental Health Review Board in deciding how long the accused should be detained." Concerning fair and equitable justice, the Bill granted the mental health authorities the discretion to detain/hold/treat the designated person indefinitely. Yet, although the intention was to limit how long a person could be detained under an NCR designation, the provisions have yet to be proclaimed. This issue is discussed in the article by Haag.

Another controversial issue of the Bill is its emphasis on the civil standard of proof, that "every person is presumed not to suffer from a mental disorder until the contrary is proved on the balance of probabilities." This proof rests on a balance of probabilities that it is more likely to have occurred than not, as opposed to the criminal standard of beyond a reasonable doubt (i.e., the judge or jury must be satisfied beyond a reasonable doubt that the defendant is guilty) (Pyzer, 2010). Again, these concepts have received considerable attention from legal scholars and will be discussed more broadly in this Special Issue.

Section 16 of Canada's Criminal Code reads as follows:

> **"Defense of mental disorder**
> **16 (1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
> **Presumption**
> **(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
> **Burden of Proof**
> **(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. [...]". (Criminal Code – R.S.C., 1985, c. C-46. Section 16)

As readers may know, our criminal justice and legal system are based on those of Britain, our colonial parent. Hence, the issue of a mental disorder defence in Canada can be traced to the British case of James Hadfield, who in 1800 fired a gun at King George III and was found not guilty of attempted murder by reason of insanity. This notion of an insanity defense can be traced back to the Code of Hammurabi (1792 -1750 BC) (the written Code of Babylon, which then occupied modern Iraq). This Code specified the criteria for exempting someone found guilty of a punishable offence from the proscribed punishment due to mental disorder *non-compos mentis*, which translates literally as 'not master of one's mind' and means unsound of mind, or insane.

In fact, an indirect reference to a mental disorder/ lack of mastery of mind has been aligned with the ancient religious and biblical test of "good and evil" in which a person would be considered insane if they could NOT distinguish between the two[5]. Then in 1724, under British Common Law, in the case of "Rex v. Arnold," the judge ruled that for acquittal by reason of insanity because the defendant had acted like a "wild beast" – sometimes referred to as the 'wild beast test' (Walker, 1968). Prior to this case, the legal system used 'trial by ordeal' as a natural test to determine if the defendant was evil or insane. The irony was that if they didn't survive the ordeal, such as being submerged under water for an indefinite period, they were considered evil or insane and using trickery of death to hide the fact they were witches– presumably something no 'normal' person would think of doing! By the middle of the 15th Century jury systems had become independent assessors

and assumed their modern role as deciders of fact in Britain.

MCNAUGHTON RULE VS DURHAM RULE

This Special Issue on NCR includes several international contributions which serve not only to highlight how other countries handle cases where the accused has a mental health condition but also illustrate that there are a range of different legal protocols on NCR globally. These examples further demonstrate that the designation of not criminally responsible is relative and evolutive.

Although beyond the scope of this Special Issue and article, we will briefly examine the two landmark rulings that laid the foundation for Canada's current legislation relating to NCR. The McNaughton Rule (aka M'Naghten) was the first legal test for criminal insanity in the English-speaking world. The test originated in 1843 in England with the case against Daniel McNaughton, who had shot and killed the secretary (Edward Drummond) to the Prime Minister. McNaughton thought he had killed the Prime Minister, Sir Robert Peel[6].

Based on Common Law principles, the McNaughton case laid the standards and tests for the courts to determine if the accused may be found "not guilty by reason of insanity" or "guilty but insane." A concurrent sentence could be mandatory or discretionary (but usually indeterminate – see Haag and Nicholls et al. in this issue) treatment period in a secure hospital facility or elsewhere at the court's discretion.

The McNaughton Rule or 'insanity' defence forms many Commonwealth countries' legal framework and approach. In addition to Canada, these include Australia, Hong Kong, India, the Republic of Ireland, and New Zealand. Norway (e.g., see Carney, Knust, and Pokhariyal and Dubey in this issue), and most of the United States also base their test on the principles defined in the McNaughton Rule. The standards and various tests (with some variations and amendments) have endured for almost 200 years without criticism. Several of these tests are discussed in this issue.

The other primary standard, introduced in New Hampshire in 1871, was the Durham Rule. It attempted to ensure that insanity was based on an objective diagnosis focusing on the defendant's ability to control their conduct. This is sometimes referred to as Durham's "Product Test" (for mental disease), for finding a defendant not criminally responsible if their unlawful act is the product of a mental disease or defect (FindLaw team, 2019). The Product Test was seen to simplify the McNaughton Rule and the Irresistible Impulse Test, which focuses on the defendant's awareness.

In practice, however, this "Product Test" was challenging to prove in court and, except for New Hampshire and the US Virgin Islands (Asokan TV, 2016; Sakrani, 2023), the Durham Rule was abandoned in 1972. Although the test relied on a psychiatrist's testimony, it became clear that it was ambiguous and not (always) grounded in reliable evidence.

Although the Durham Rule is seldom used today, it shows that the ability to legally define criminal responsibility and to establish uniform, evidence-based standards may be somewhat mythical, despite the rule's intention to ensure fair and equitable administration of justice. This is especially true when it comes to legal insanity.

NOT CRIMINALLY RESPONSIBLE (NCR) *VS* UNFIT TO STAND TRIAL (UST)

Two concepts that may cause some confusion to a layperson are the designations *NCR* and *unfit to stand trial (UST)*. In simpler terms, *NCR* pertains to one's mental state when committing the offence, while *UST* concerns the accused's mental status during the legal proceedings or inability to meaningfully communication with his or her lawyer. However, as Pyzer (2020) notes, "a person who has a mental illness at the time of trial can be ruled unfit to stand trial but being mentally ill is often not enough to convince a judge".

The concepts of NCR and UST are thus related but deal with different aspects of the legal proceedings and are intended to ensure that a defendant has the mental capacity to understand the court process and can respond rationally to possible questioning from the Crown and/or defence.

NCR AND PUBLIC NAIVETY: DISTORTING THE LENS OF JUSTICE?

Based on the nature of most media coverage, there is a real risk of 'moral panic' – that is, given the general level of naivety among the public about what NCR means (see Pandila in this issue) and given the usual degree of gravity of the accused's offence portrayed, the public tends to see the NCR designation in a negative light. Contrary to some naïve rhetoric, the

NCR designation is not a get-out-of- jail-free card. In fact, an individual may be under a Review Board's jurisdiction indefinitely, regardless of the seriousness of their crime[7].

Yet, a study by Anne Crocker and associates from the Douglas Mental Health University at McGill University in Montreal found that the recidivism rate of those found NCR to be lower (17%) than for offenders able to stand trial (Crocker et al., 2015). Also, contrary to the sensational cases covered in the media, only a small proportion of those found NCR for severe violent offences re-offended. Yet, in this issue of the *Justice Report*, several articles (e.g., Knust, Vojta and Pingen, and Schulz) indicate that such outcomes may be different in certain jurisdictions.

Regrettably, Crocker et al.'s study found that three-quarters of the NCR offenders had prior contact with the mental health system. This raises concern about fundamental risk management, support, and education on the intervention and prevention of criminality for those in contact with the mental health system.

MOVING FORWARD– ARE WE LETTING DANGEROUS PEOPLE OUT ON THE STREETS?

While the criminal justice system is the cornerstone of democracy and civil society (see Grant, 2018), the laws our justice system has forged a foundation for building social-political consensus or triggering a social-political conflict that undermines the fundamental principles of the Rule of Law. One such issue introduced in this article and discussed in various capacities throughout this Special Issue of the *Justice Report* is the designation of 'not criminally responsible'.

A couple of takeaways might include the following in our effort to move forward: despite its history and (legal) discourse, there are still several fundamental misconceptions around the NCR designation – not only in Canada but worldwide, as illustrated in several articles. For example, Haag notes that the challenges of developing a uniform application, meaning, and understanding of NCRMD require more research. Other challenges include but are not limited to, how we can ensure Review Boards are and remain independent and objective; can/should the concept of NCR be revised to better reflect the values and norms of society today; and how objective/important is the principle of burden of proof for a designation that cannot be fully defined or operationalized?

NCR is important because we all expect/want the administration of criminal law to be efficient and effective in upholding the Rule of Law. In sharing several different themes at a national and international level, it is hoped that the NCR designation and its myriad issues will inspire further discourse and scholarly research to inform future directions and policy while enlivening awareness. It is not assumed that the articles in this Special Issue will answer or resolve the myths and misconceptions or confirm any 'realities', but they will likely leave the reader better informed and filled with concern.

NOTES

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2. The insanity defense is used in only about 1% of cases in the U.S. and is successful less than 25 per cent of the time.

3. Also see the article by Nicholls et al. in this issue.

4. The following article at CTV News (20 November 2020) lists some of the more high-profile NCR cases in Canada – 'Notable Canadian cases where an accused was found not criminally responsible'.

5. The early 1970s comedian Flip Wilson used to use the phrase "the devil made me buy this dress" and anything else that might have gotten him into 'trouble'. In 2021 a supernatural horror film used the title "The Conjuring: The Devil Made Me Do It." The movie involves demonology and exorcism.

6. Peel was also regarded as the father of modern British policing.

7. As an independent body the Review Board is expected to be objective in its assessment. However, at times the Board has been accused of basing their decisions along political lines. In 2021 the Alberta Review Board was accused by Matthew de Grood's lawyers as being politically biased in their decision to not grant de Grood greater freedoms (Grant, 2021).

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RÉSUMÉ

Not Criminally Responsible: Myths, Realities and Challenges

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Dans cet article, notre rédacteur invité, M. John Winterdyk, nous ramène à Babylone dans un aperçu fascinant de la non-responsabilité criminelle (NRC) dans le contexte de ce numéro spécial de *l'Actualités JUSTICE Report*. Éclairé par des articles sur divers thèmes liés à la NRC, d'un point de vue national et international, ce numéro spécial offre un débat intéressant sur la désignation complexe et controversée. Notant que le sujet de la non-responsabilité criminelle est trop complexe à aborder dans cette publication, Winterdyk souligne qu'il existe toujours un certain nombre d'idées fausses sur la désignation, malgré son histoire et son discours (juridique), non seulement au Canada, mais dans le monde entier, comme en témoignent plusieurs articles de ce numéro spécial. Notant que les verdicts de non-responsabilité criminelle représentent moins d'un dixième d'un pour cent des cas d'adultes au Canada chaque année, Winterdyk remet en question le principe du fardeau de la preuve pour une désignation ni entièrement définie ni mise en œuvre. Winterdyk exprime le besoin de poursuivre le discours et la recherche universitaire afin d'éclairer les orientations et les politiques futures concernant la NRC tout en sensibilisant le public.

The Mental Incapacity Defence in International Criminal Justice: Some Observations in Light of the ICC Appeal Judgment in the *Ongwen* Case

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The International Criminal Court (ICC) is the first international criminal tribunal to explicitly codify the mental incapacity defence in its statute. The recent case against Dominic Ongwen, a former child soldier and high-ranking commander in the insurgent group "Lord's Resistance Army," offered ICC the first opportunity to define and apply the preconditions for a defence in practice. As this article shows, despite the novelty of this recent development, there is a pattern in how the international criminal tribunals have been treating the plausibility of mental health defences since WWII which extends to ICC. The article concludes by considering the implications of the Ongwen case for future ICC jurisprudence.

INTRODUCTION

he International Criminal Court (ICC) is a treaty-based international criminal tribunal tasked with adjudicating perpetrators of international crimes (i.e., genocide, crimes against humanity, war crimes and the crime of aggression) committed on the territory of states accepting its jurisdiction or by their citizens.[1] It is the first international criminal tribunal to explicitly codify the mental incapacity defence in its (1998) statute. Art. 31(1)(a) of the ICC Statute stipulates that a person will not be considered criminally responsible if, at the time of that person's conduct, "[t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law". The article establishes two fundamental preconditions for a successful defence: the existence of a mental health condition and its destructive impact on the person's cognition (the capacity to understand the unlawfulness or nature of the conduct) or volition (the capacity to control the conduct) at the time of the offence. According to scholars, these preconditions are consistent with the requirements for mental incapacity defence in most domestic jurisdictions (see Cryer et al. 2021).[2] Nevertheless, the ICC judges have long abstained from contouring them in practice.

In fact, until the defence was raised for the first time in the *Ongwen* case,[3] the ICC had no opportunity to interpret these preconditions (see Chifflet & Freckelton 2022). This is not to say that the impact of mental health issues on criminal liability has been an overlooked topic in international criminal justice. In the first section of this article, we will discuss the conceptualization and significance of mental health defences in the jurisprudence of ICC's predecessors, the International Military

Tribunal in Nuremberg and the UN *ad hoc* tribunals for the former Yugoslavia and Rwanda. Then we will analyze how the ICC judges defined the preconditions for the mental incapacity defence in the *Ongwen* case. Finally, we will discuss patterns in the approach of the international criminal tribunals to the question of mental illnesses in defendants and consider the implications of the *Ongwen* case for the treatment of mental incapacity defence in future ICC jurisprudence.

MENTAL HEALTH DEFENCES AT THE INTERNATIONAL MILITARY TRIBUNAL AND UN *AD HOC* TRIBUNALS

International criminal justice started operating in the immediate aftermath of World War II with the Allied prosecution of the major Nazi war criminals before the International Military Tribunal (IMT) in Nuremberg. The Allied powers were adamant that it was necessary—for symbolic and preventive purposes—to have the criminal liability of those individuals deemed the most responsible for the aggressive war and concomitant atrocities determined by an international court of law (see Taylor 1993). Fundamentally, this required anchoring the guilt of the accused in rationality and personal agency, which was at odds with the popular perception and even scientific hypotheses about the "mad Nazi" criminality at the time (see Waller 2007). While the defendants could plea mental incapacity under somewhat ambiguous fair-trial guarantees—which one of them, Rudolf Hess, in fact, did as incompetence to stand trial, albeit unsuccessfully—the probability of it successfully exculpating the defendants was greatly diminished by the wide margin of discretion afforded the judges when attributing the probative value to evidence. The urgency to condemn the atrocities of Nazis as crimes of rational individuals also made the prosecutors at Nuremberg resistant to anything that could introduce mental incapacity as a defence. The protocols of psychological tests administered to the defendants by mental health professionals were never used in the trial and were thus not mentioned in the official proceedings (see Waller 2007). However, the subsequently published analysis of the protocols convincingly argued against mental disorders being the cause of the Nazi crimes (see Harrower 1976). A considerable body of evidence irrefutably proved that sane and rational individuals had committed the crimes of the Nazi elite in a systematic, widespread and premeditated manner.

At the beginning of the 1990s, the UN Security Council decided to continue the legacy of Nuremberg by establishing two *ad hoc* international criminal tribunals to adjudicate perpetrators of international crimes committed on the territory of the former Yugoslavia (ICTY) and Rwanda (ICTR). Similar to IMT, there was no explicit mention of mental health defences in the statutes of the tribunals. Rather, the possibility to plea mental incapacity or diminished mental capacity was offered in the context of the provisions on disclosure obligations in the tribunals' Rules of Procedure and Evidence (RPE). Acting on these provisions, the ICTY jurisprudence set the contours of the diminished capacity plea, albeit not as a defence potentially leading to an acquittal but as a mitigating factor in sentencing.[4] More specifically, if a defendant's capacity to control or appreciate the nature or unlawfulness of their conduct was diminished during the offence, it could mitigate the imposed sentence. In practice, the success of such pleas faced serious challenges (see Chifflet & Freckelton 2022). The ICTY judges required expert forensic evidence substantiating the pleas to match a rigorous diagnostic standard to clear any doubts about malingering. Such a standard was often challenging to achieve since the experts were limited in their evaluations by long periods between the charged conduct and the trials. The significantly retrospective nature of evaluations diminished the reliability of diagnoses from the start. Given the gravity and nature of the committed crimes, their testimonies were usually deemed unreliable and had to be considered in light of the entirety of available evidence. As a result, the diminished capacity pleas were primarily unsuccessful. The judges either were not convinced that the accused suffered from mental health issues or that such issues caused a substantial impairment of their cognitive or volitional capacity that would warrant mitigation of their sentences.

MENTAL INCAPACITY DEFENCE AT THE INTERNATIONAL CRIMINAL COURT

The *Ongwen* case represented "a series of firsts" for ICC (see Hiromoto & Sparr 2023). Mr. Dominic Ongwen was a former child soldier and high-ranking commander in the insurgent group "Lord's Resistance Army" (LRA), which has been engaged in armed conflict with the Government of Uganda since 1986. He is the first of the wanted LRA leaders to be tried and convicted by ICC. Considering his personal history—including the abduction into LRA at the age of nine and the violent upbringing in the

group—, the trial of Mr. Ongwen was also the first case where ICC was forced to tackle the sensitive issue of a victim-turned- perpetrator within the context of a mental incapacity defence.

Mr. Ongwen was found guilty by ICC of 61 counts of war crimes and crimes against humanity (e.g., murder, torture, rape, and the conscription of child soldiers) which he committed between 2002 and 2005 as a commander of the LRA Sinia Brigade. ICC does not have jurisdiction over persons under the age of 18 at the time of the alleged commission of a crime. Mr. Ongwen could, therefore, only be charged for the crimes committed as an adult. On 15 December 2022, the ICC Appeals Chamber affirmed his conviction and the 25-year prison sentence. During the trial, the Defence argued that the childhood trauma of abduction and violent upbringing in LRA was the source of different mental illnesses in Mr. Ongwen—including post-traumatic stress disorder (PTSD), depressive illness and dissociative disorder—which effectively destroyed his mental capacity at the time of the charged conduct and thus rendered him not criminally responsible. The raised mental incapacity defence had broader socio-legal implications. Its success would have had an exonerating impact not only on Mr. Ongwen but, symbolically, also on many other former child soldiers whose traumatic experiences might have influenced the atrocities they committed. In terms of transitional justice policies, it would have affirmed the view of former child soldiers as victims who lacked personal agency, a discourse that has growingly been criticized as simplistic and an obstacle to reconciliation in conflict-affected areas (see e.g., Drumbl 2012). Therefore, the expectations from ICC to clearly define the preconditions for a mental incapacity defence were high.

Ultimately, the *Ongwen* case addressed these preconditions only partially. ICC rejected the defence because Mr. Ongwen's mental health at the time of the charged conduct did not suffer from any disease or defect. Consequently, this made the question of whether his capacity was destroyed irrelevant. The ICC judges based their decision on both parties' forensic evidence and collateral evidence (e.g., witness testimonies). According to the judges, the major issues undermining the reliability of the Defence's forensic evidence were the partiality of the consulted experts and their diagnoses not matching the standard that would clear doubts of malingering.[5] The concerns about the partiality were based on the existing therapeutic relationship between the consulted experts and Mr. Ongwen. The second issue concerned the diagnostic methodology used in drafting the reports. More specifically, the experts were criticized for basing their evaluations solely on Ongwen's clinical interviews without considering other evidence or verifying their findings against malingering with other standardized assessment tools. The fact that Mr. Ongwen denied interviews with the Prosecutor's experts increased the suspicion of malingering. The judges found the forensic evidence presented by the Prosecutor's experts more persuasive regarding comprehensiveness and validity, despite lacking direct access to Mr. Ongwen.[6] Based on other expert reports the Prosecutor's experts found that the behavior of Mr. Ongwen at the time relevant to the charges did not meet diagnostic criteria for PTSD, depression, or dissociative disorder.

On the contrary, his behaviour, actions and the ascension among the LRA ranks were found to be indicative of a rationally motivated individual who, despite many odds, managed to develop morally, cognitively, socially, emotionally and psychologically. These findings were also supported by other evidence presented at the trial, none of which pointed to illness during the charged period. The ICC judges were thus persuaded to dismiss the existence of mental illness in Mr. Ongwen and, consequently, the mental incapacity defence.

CONCLUSION

There is an evident pattern of suspicion in the international criminal tribunals' approach to the issue of defendants' mental health. Like IMT and ICTY, ICC was critical of an over-reliance on forensic expert evidence when determining the existence of mental illnesses in the defendant. All the tribunals emphasized the judges' importance as the ultimate factfinders and the necessity to rely on evidence beyond that provided by forensic experts (see Hiromoto & Sparr 2023, Chifflet & Freckelton 2022). Considering the nature and gravity of international crimes and the role of international criminal tribunals, this approach is not surprising. International crimes are often committed systematically or widely over long periods and by enforcing discriminatory policies towards certain social groups. This indicates a level of rationality and premeditation that is largely incompatible with the etiology of mental illnesses; at least in those mid- and high-ranking

perpetrators who are significantly involved in the planning, preparation, ordering and execution of atrocities. Arguing for their exculpation based on mental health issues faces serious challenges, given the impact their acquittal might have on the restoration of peace between the groups who suffered atrocities. The initial ICC jurisprudence on the mental incapacity defence made it clear that – besides meeting a rigorous diagnostic standard – any expert findings substantiating such a defence must also be supported by substantial collateral evidence. Experts' access to such evidence is likely to prove difficult. They would require testimonies from dozens – or even hundreds – of witnesses who might also speak different languages or live in remote areas worldwide (see Hiromoto & Sparr 2023). Also, the uncertainty about what should, in practice, amount to destroying the defendant's volitional or cognitive capacity as the second requirement is likely to hamper future attempts at arguing the mental incapacity defence at ICC. However, such attempts at contouring are necessary to foster more clarity and legitimacy in the ICC jurisprudence.

RÉSUMÉ

The Mental Incapacity Defence in International Criminal Justice: Some Observations in Light of the ICC Appeal Judgment in the *Ongwen* case

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La Cour pénale internationale (CPI) est le premier tribunal pénal international à codifier dans son statut la défense fondée sur les troubles mentaux. Le cas récent contre Dominic Ongwen, un ancien enfant-soldat et commandant de haut rang dans le groupe d'insurgés « Armée de résistance du Seigneur », a permis à la CPI de définir pour la première fois les conditions préalables à l'application pratique de cette défense. L'article démontre que, malgré la nouveauté de ces développements, on constate un modèle dans la façon dont les tribunaux pénaux internationaux ont traité la plausibilité des défenses liées à la santé mentale depuis la Seconde Guerre mondiale, et ce modèle s'étend à la CPI. L'article conclut en examinant les
implications de l'affaire Ongwen pour la jurisprudence future de la CPI.

NOTES

1. See the ICC Statute (the Rome Statute) Art. 12. Canada became a State Party by ratifying the Rome Statute on 07 July 2000. It has yet to accept and ratify the aggression protocol (see: **https://crimeofaggression.info/the-role-of- states/status-of-ratification-and-implementation/**).

2. For example, Canadian Criminal Code in Section 16 stipulates the severity of impact of a mental disorder similar to the one in the ICC Statute; i.e. requiring the person to be rendered incapable of appreciating the nature and quality of the act.

3. *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15).

4. See *Prosecutor v Delalić et al.* (IT-96-21-A), Appeals Chamber Judgment (20 February 2001) and *Prosecutor v Mitar Vasiljević* (IT-98-32-T), Trial Chamber Judgment (29 November 2002).

5. *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), Appeals Judgment, 15 December 2022, paras. 1124, 1216, 1253, 1257.

6. *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), Appeals Judgment, 15 December 2022, paras. 1301-1304, 1370, 1380-1383.

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Temporary Non-Pathological Criminal Incapacity (TNPCI)—The Namibian Position

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Upon its Independence in 1990, Namibia's substantial criminal law was derived from South Africa's CPA (i.e., SA's Criminal Procedure Act 51 of 1977). The Act defines criminal incapacity in terms of psychological deficiencies pertaining to one's cognitive and conative capacities, and a comorbid 'mental illness or mental defect'. Since early 1980s the South African and Namibian courts gradually abandoned the statutory requirement of 'mental illness or mental defect' and developed what would become known as the temporary non-pathological criminal incapacity defence, accepting that any factor can impair criminal capacity. Over time however, the countries parted ways on the meaning of criminal incapacity. Whereas the South African Supreme Court of Appeal (SCA) made a U-turn on the defence, the Namibian Supreme Court held its course. The article discusses the merits of the Namibian position against the backdrop of the "affective revolution" in neuroscience and progress in research on intrapsychic restraints related to self-control.

INTRODUCTION

Namibia derived its substantial criminal law from South Africa upon national Independence on 21 March 1990. Part of this heritage is the Criminal Procedure Act 51 of 1977 (CPA), section 78 (1) of which defined for the first time, albeit implicitly, criminal capacity as distinct from culpability, laying out the capacity test as follows:

> A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable...
>
> > **(a)** of appreciating the wrongfulness of his act; or
> > **(b)** of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such an act.

The CPA text defines criminal incapacity in terms of psychological requirements pertaining to one's cognitive and conative capacities. The definition also stipulates that the criminal-incapacity defence requires the defendant had a comorbid 'mental illness or mental defect'. At the time of Namibian Independence, however, the courts had already mitigated the limiting effect of this pathology requirement for the criminal incapacity defence. From the early 1980s the courts developed what would become known as the *temporary* non-pathological criminal incapacity (TNPCI) defence.[1] In S v Chretien (1981), the court held that even voluntary intoxication could potentially serve to exclude criminal capacity. S v Arnold (1985) and S v Campher (1987) extended the basis of the defence to include severe emotional stress. Thereafter the South African and the Namibian courts accepted that any factor could impair criminal capacity.[2]

Discounting the material requirement of mental illness or mental defect, pathological and non-pathological incapacity (aka automatism) are identical (i.e., with respect to the psychological requirements, which are the substance of the criminal-capacity test (Figure 1: Snyman, 2014, p. 157).

FAULT LINES IN THE LEGAL FABRIC OF CRIMINAL CAPACITY—NAMIBIA AND SOUTH AFRICA PART WAYS ON CRIMINAL INCAPACITY

The alignment of the law with principle, logic, and coherence in Chretien and subsequent decisions posed problems for the courts. The now-entirely subjective formulation of capacity led to the acceptance of factors arising from the affective domain of mental functions and ignored the recommendation of the Rumpff Commission.[3] In its report to parliament, the Commission emphasized that emotional responses should not impinge exclusively on the criminal capacity inquiry (Commission, 1967, 44 para 9.9. B). The South African and Namibian courts thus applied some cautionary principles to ensure that their findings would not entirely depend on the *defendant's 'ipse dixit*' (i.e., '*he said so*'). In its influential decision in S v Eadie (2002), the South African Supreme Court of Appeal (SCA) recapped these principles very clearly:

> It has repeatedly been stated by this Court that:
> **i.** in discharging the onus, the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
> **ii**. an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
> **iii**. evidence in support of such a defence must be carefully scrutinized;
> **iv**. it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.

In *Eadie* the above principles should have mattered most, with the defendant raising the defence of loss of self-control, the conative form of TNPCI, allegedly caused by severe emotional stress experienced after provocation by the victim. An expert witness supported the defence, but during cross examination he had to admit that the defendant's conduct was not distinguishable from fully self-controlled behaviour (Eadie, at 20). The court rejected the defendant's TNPCI claim based on the abovementioned principles. Upon appeal, which the SCA rejected, the court made an unexpected U-turn on this defence by concluding, "It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism" (*Eadie*, at 70). This novel 'all-or-nothing' approach of the court limited the admissible effects of emotions on self-control to instances of "psychogenic automatism", where emotional stress is so overbearing that it entirely destroyed the defendant's conative capacity to render his conduct involuntary. In the wake of the *Eadie* decision, it became common understanding that, by the decision, the TNPCI defence (in the form of conative incapacity) had been entirely abolished (Snyman, 2014/2019; Grant, 2018; Kemp et al., 2018).

The watershed decision in *Eadie* marks the crossroads at which the South African and Namibian law on criminal incapacity parted ways. Where the Namibian courts had the opportunity to emulate the South African development, they did not. In Hangue v The State (at 32) (2015), a case of murder in the context of voluntary intoxication, the Namibian Supreme Court (SC) formulated a point of departure markedly different from *Eadie*. First the court highlighted the cautionary principles put forth in *Eadie*, but then the court held:

> [...] frequently occurring, is a state of intoxication, whilst not divorcing the person's will from their bodily movements, is sufficiently severe that they do not appreciate what they are doing is unlawful or that they are unable to act in accordance with that appreciation. Persons falling within this category will also not be held criminally liable for misdeeds committed in that condition" (emphasis added).

Although the affective domain did not play a role in Hangue, the court upheld the doctrine that voluntariness of conduct (*actus reus*) and conative capacity for self-control (culpability) were not identical and decidedly did not follow the argument in *Eadie*.

IMPLICATIONS FOR THE FUTURE

The SCA's 'all or nothing' approach in respect of the conative aspect of the TNCPI defence may have been triggered by the lack of quantitative scientific evidence (see Kaliski, 2009) which could shed light on the intricate relation between the three mental functions. The SCA, in turn, retained the law's receptivity regarding ongoing progress in neuroscience and the "affective revolution" (Stryker

& Stryker, 2016). And this could pay dividends in the future on the back of research on intrapsychic restraints related to self-control.

Under the rubric ego-depletion, the research field looks into the relationship between self-regulation, self- control, and aggression. Self-regulation makes self-control possible or unnecessary, inhibiting strong impulses and reducing the frequency and intensity of strong impulses by managing stress load and recovery (Shanker, 2016). Implicitly challenging the Rumpff Commission's mantra that "where there is volitional action, volitional control is possible ..." (1967, para 9.33.), studies on ego-depletion investigate the hypothesis that the capacity for self-control or self-regulation is a limited resource that operates like a strength or energy "when people have already expended some of their resources, their capacity for further self-control is reduced. If an aggressive impulse arose at this point of self-regulatory depletion, a person would probably be less able than usual to restrain it" (DeWall et al., 2007, 63-64). In this context, ego-depletion is a concept that holds the potential to guide the courts on whether to accept TNPCI when raised as a defence.

The current state of the research cannot satisfy the need of the courts for evidence-based guidance - a need so pertinently shown in *Eadie*. Therefore, according to the cautionary principles, the Namibian courts will have to do with the uncertainties. But with the continued relevance of the TNPCI as a criminal defence, another aspect still comes under focus.

The Namibian courts are confronted with a number of related questions. For example, how far and under which circumstances advances in neuro-psychological research and neuro-radiological and neuro-physiological techniques represent (objective) empirical evidence of defects in the neural systems of the defendant shall be accepted in support of defendants' claims that they temporarily lost their ability to control themselves. But this dilemma should not be dealt with under the rubric of free-will (Snyman, 2016). However, the status quo of the law concerning free-will as a metaphysical concept remains the same. Irrespective of the degree to which science can demonstrate that in the empirical world, human conduct can be explained as the result of other empirical phenomena. This does not invalidate the assumption of, nor belief in, free will, which importantly may have its role to play in respect of our sense of responsibility (Wisniewski, Deutschländer, & Haynes, 2019; Schünemann, 1984). Answers to the question above point to the need for a recalibration of the scales of justice and the (re-)assertion of the 'normative character of culpability' (Snyman, 2016). The latter concept holds that criminal responsibility is a normative concept which must ultimately be judged by reference to some objective normative standard (Grant, 2018; Burchell, 2016; Snyman, 2014). The diverse facets of the ongoing discourse on culpability are beyond the scope of this article. Noteworthy, however, is the idea of responsibility without the indeterminist perspective. This idea posits that a person can (and shall) assume responsibility, regardless of the factors leading to their unlawful conduct (Schiemann, 2012). Another argument highlights the notion of free will as an aspect of the cultural reality of human interaction, represented in language and other forms of communication, a part of the socially constructed reality (Schünemann, 1984).

Where scientific evidence in South Africa can show whether or not a defendant suffered from a loss of self- control, an 'all or nothing' approach à la Eadie is no longer warranted or justified. Unlike the unsolvable riddle of free-will, embracing the normative character of culpability creates the conceptual space to accommodate research evidence on intrapsychic restraints related to self-control; research evidence would be expected to provide the objective standards presupposed in the normative concept of guilt/blame. Technology that will facilitate perspectives with high resolution of neurophysiological states and processes will also enable the theoretical analysis of data to disentangle the hitherto unfathomable relationship between affect and decisions of free will.

CONCLUSION

The Namibian Superior Courts attempted to define the legal parameters necessary for the conative TNPCI- defence in Namibian law. Hangue preserved the law's conceptual compatibility with theoretical advances in psychology and neurosciences. Those advances placed doubts on the viability of calibrating the normative boundaries for blameworthiness (culpability) on the assumption that affective states are either overbearing or have nothing to do with the conative ability of the actor. By now, there is a real possibility that this will change in the not-too-distant future. Upon

materializing such possibilities, the ascription of criminal incapacity will depend less on the court's sympathy with the defendant, or conversely, judges' bias against defendants, and more on quasi-objective empirical facts in the post-positivist parlance (Fox, 2008). Significantly, such possibilities do not impinge on the "free-will" doctrine of the law as did earlier attempts at unhinging the criminal law based on claims that free-will is an epiphenomenon without any etiological relevance. Free will has always been an illusion, and however-so-much progress in empirical research will not ensure that free will goes away. Therefore, the focus should instead be where to place the boundaries of blameworthiness – a discussion arising under the heading 'the normative character of culpability'. Advances in neuro-psychological research will assist in developing objective standards.

NOTES

1. The adjective 'temporary' underlines the non-enduring condition as compared with mental illness or defect.

2. The law as laid out in S v Chretien (1981) has been accepted in many decisions of the Namibian superior courts (High Court and Supreme Court). Pars pro toto: S v Goliath (CC 23/2019) [2020] NAHCMD 545 at 65; S v Rickerts (CC 8 of 2015) [2016] NAHCMD 30 at 21; S v Mesho (CC 4 of 2018) [2022] NAHCNLD 109 at 24; S v Ilukena (SA 69 of 2019) [2021] NASC 32 at 49; Hangue v The State (SA 29-2003) [2015] NASC (15 December 2015); S v Ngoya 2006 (2) NR 643 (HC) at 38; S v Gabriel (CC 17/2010) and Subeb v S (HC-MD- CRI-APP-CAL-2019/00074) [2020] NAHCMD 73 (28 February 2020) at 24 and 27.

3. South African Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Other Related Matters, named after its chair Frans Rumpff

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RÉSUMÉ

Temporary Non-Pathological Criminal Incapacity (TNPCI) – the Namibian Position

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Lors de son indépendance en 1990, le droit pénal namibien substantiel a été dérivé du Criminal Procedure Act 51 de 1977 de l'Afrique du Sud. La Loi définit l'incapacité criminelle en termes de déficiences psychologiques liées aux capacités cognitives/conatives d'une personne et d'une comorbidité « maladie mentale ou déficience mentale ». Depuis 1980, les tribunaux d'Afrique du Sud et de Namibie ont progressivement abandonné l'exigence statutaire de « maladie mentale ou déficience mentale ». Acceptant que tout facteur peut nuire à la capacité criminelle, ils ont développé ce qu'on appelle la défense d'incapacités criminelles temporaires non médicales. Toutefois, au fil du temps, les deux pays divergent quant à la signification de la capacité criminelle. Alors que la Cour suprême d'appel sud-africaine (SCA) a fait volte-face à cette défense, la Cour suprême namibienne a maintenu son cap. L'article examine les mérites de la position namibienne dans le contexte de la "révolution affective" des neurosciences et des progrès de la recherche sur les contraintes intrapsychiques liées à la maîtrise de soi.

Study on the Status of NCRMD (Not Criminally Responsible on Account of Mental Disorder): The Insanity Defence in India

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While the success with which defences under Section 84 of the Indian Penal Code – NCRMD provision – have been used is not easily referenced due to a lack of investigative studies, only 17.6% of such cases between 2000 and 2009 met the stringent requirements laid out in the IPC. Pokhariyal and Dubey here point to various reasons, such as underdevelopment in the field of forensic psychiatry in India; the stringent requirements around the burden of proof, which prevents some of the accused and counsel from pleading NCRMD; the lack of a definition for "unsoundness of mind" is further complicated by the frequent use of "insanity" as a synonym in the courts. The authors conclude by advocating for definitional clarifications to ensure more consistency in interpretation and application, although this should aim to make the provision clearer, as making it stricter would work against the goal of fostering the NCRMD defence.

INTRODUCTION TO THE QUESTION OF INSANITY IN CRIMINAL LIABILITY

The question of criminal liability coupled with mental illness remains a lingering concern not only for Indian criminal jurisprudence but worldwide. Aside from wallowing in various aspects of this subject, very few compelling ideas that justify or explain the fervour of the debate have emerged. Yet the debates raise a few intriguing questions that demand deep consideration. In recent history, the Supreme Court of India released an accused who was incarcerated for her father's murder owing to insanity; a release order was made after her serving more than a decade in jail (Chowdhury & Law, 2023), and a mother is punished as a criminal for succumbing to insanity and throwing her child out the hospital window. These cases raise numerous questions regarding the application of an insanity defence in India (Hakim & Law, 2022).

LOCATING THE CONCEPTUAL ROOTS OF THE DEFENCE OF INSANITY

The conceptual reasoning for the insanity defence stems from the retributive and deterrent theories of punishment, as it is understood that a mentally unstable person is incapable of drawing basic moral judgments and thus incapable of complying with social expectations of behaviour (Sharma, 1965). It is equally unquestionable that penal sanctions of punishment are unlikely to stop such individuals from committing crimes. Hence the general defences enumerated under the *Indian Penal Code* (IPC, 1860) incorporate the "Act of person of unsound mind" (Indian Penal Code, 1860). But the litmus test of criminal liability here is to be able to identify those who are of "unsound mind." Likewise, other jurisdictions, including Canada and some of the United States, also provide for an insanity defence taking the form of NCRMD (not criminally responsible on account of mental

disorder), where the accused must be found to have been suffering from a mental disorder at the time of the commission of the offence. Under this lens, the focus of the disposition shifts from punishment to treatment and rehabilitation, and the goal becomes to address the mental health underlying the commission of the offence as the means of recovery and reintegration into society (Weiner, 1985).

The counterpart of Canada's not criminally responsible on account of mental disorder (NCRMD) is recognized as a legal defence in the Indian criminal justice system under Section 84, whereby a person is released from criminal liability for an offence due to their inability to understand the consequences of their actions at the time of the commission of a crime owing to mental illness (Gaur, 2019). Section 84 is based on the *Furiosus furore sui punier maxim*, which means 'man is best punished by his madness' (Srivastava & Huda, 1902). The term "unsoundness of mind" here is analyzed via the McNaughten Rules. If such a defence is established, the accused will be committed to a psychiatric hospital under Section 471 of the Criminal Procedure Code (CrPC, 1974). This section is supplemented by the Mental Health Care Act (2017), which states that a person found not criminally responsible due to mental illness or disability must be treated in the least-restrictive and most-appropriate setting.

The burden of proof falls on the accused to prove they were not criminally responsible for their actions due to mental illness or disorder (State of Madhya Pradesh v. Ahmadullah, 1961). It should also be noted that this defence is only available in cases where the accused suffered from a mental illness or disorder when they committed the crime. The legal provision of Section 84 has undergone several changes and interpretations over the years. In 1974, the Supreme Court clarified for Indian jurisprudence the case of State of Karnataka v. Narayanappa (1999)—that the burden of proving insanity is on the accused, who must prove they were incapable of knowing the nature of their act at the time of the crime (Dahyabhai Chhaganbhai Thakker v. State of Gujarat, 1964).

MAPPING THE JUDICIAL INTERPRETATION OF INSANITY IN INDIA

In India, an attempt to define "unsoundness of mind" or "Legal Insanity" was first made by the Calcutta High Court in Queen- Empress v. Kader Nasyer Shah (1896). The court believed "Legal Insanity" could be constituted by a condition that impairs the cognitive faculties of the mind to the extent that an offender becomes incapable of knowing that the Act they are committing is wrong and can seek a defence of unsoundness of the mind and loss of the ability to reason (Bapu Gajraj Singh v. State of Rajasthan, 2007). Nevertheless, here, mere weak intellect, epileptic fits, impulse or queer behaviour on the part of an offender will not constitute an impairment of their cognitive ability to know the nature of their Act (Hari Singh Gond v. State of Madhya Pradesh, 2009), and an offender will not absolve of their criminal liability on account of unsoundness of mind. (Amrit Bhushan v. Union of India, 1977). While the term legal insanity is not found in Section 84, it has been consolidated as a synonym for "unsoundness of mind" through jurisprudence.

The Indian system of courts (i.e., the judiciary) in the past has also reported that Section 84 is a beneficial provision and should be interpreted in a manner that advances the interests of justice (Digendra Nath Roy v. The State, 19767. Further, in the landmark judgment of Surendra Mishra v State of Jharkhand (2011), the Apex Court (i.e., Supreme Court) stated that an accused seeking pardon under section 84 of the Indian Penal Code needs to prove both medical and legal insanity (Ambi v State of Kerala, 1962). The court also held that the burden of proving insanity rests on the accused, but the standard of proof is lower than for proving guilt beyond a reasonable doubt (Rishi Kesh Singh v The State, 1970).

> "***Act of a person of unsound mind:***
> *Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law."*
>
> *–Indian Penal Code - Section 84*

"Unsoundness of mind" is not defined in the Indian Penal Code. Furthermore, the ruling of "unsoundness of mind" is not defined in the IPC and is commonly referred to as and used to connote insanity" in the Indian jurisprudence, the courts, and by the public. It has different meanings in different contexts and referring to varying degrees of mental illness. Not everyone suffering from mental instability pre- or post-commission of a crime is immune to criminal prosecution.

After analyzing various landmark cases involving the insanity plea, one may safely conclude that judicial delineation in reference to Section 84 of the Indian Penal Code is inconsistent and lacks clarity due to the absence of an official definition and fixed criteria to determine what shall constitute legal insanity in a given case (Laxmi v. State, 1953).

A Law Commission of India report also emphasized such inconsistency in the application of Section 84 and recommended an amendment to align the provision with the modern medical and psychiatric understanding of incapacity due to mental illness (Math et al., 2015). No centralized or comprehensive data is available on the application of Section 84, and few studies offer insight into how often this provision is used successfully within the Indian court justice system. However, an analysis of relevant judgments by the Supreme Court and the various High Courts in India indicates a meager success rate for the insanity defence. A study by the National Institute of Mental Health and Neurosciences (NIMHANS) analyzed 125 cases referred to the institute's forensic psychiatry unit between 2000 and 2009. Of these, only 22 cases (17.6%) were found to be suffering from a mental disorder covered under section 84 of the IPC, but their liability was not diminished (Math, 2011). The reason may be the underdeveloped forensic psychiatry field in India, along with the courts' non-application or lesser application of Section 84, where forensic psychiatrists should apply their formal knowledge of the subject and the tools of 21st century to thoroughly investigate unsoundness of mind.

CONCLUSION

While there is a severe shortage of investigative inquiry into the application of Section 84 of India's penal code, available research suggests the insanity defence is rarely successful in India's courts (Math, 2011) due to definitional ambiguities and a need for greater clarity.

The insanity defence under Section 84 has been criticized for its limited scope and inconsistent application. Individuals with severe mental illness have been denied an NCRMD defence, instead being convicted and sentenced to prison. In India, the insanity defence requires more consistency concerning its interpretation and subsequent application. The authors would conclude by stating that defence of insanity is a beneficial provision, and a stricter interpretation of the provision would only frustrate the objective satisfied, albeit in part, by this defence in the first place.

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RÉSUMÉ

Study on the Status of NCRMD (Not Criminally Responsible on Account of Mental Disorder): The Insanity Defence in India

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S'il n'est pas facile d'évaluer le succès des moyens de défense utilisés au titre de l'article 84 du Code pénal indien – la disposition du NCRMD - en raison du manque d'études d'investigation, seuls 17,6 % des affaires de ce type entre 2000 et 2009 répondaient aux exigences strictes définies dans le Code pénal indien. Pokhariyal et Dubey évoquent plusieurs raisons ici, telles que le sous-développement du domaine de la psychiatrie légale en Inde ; les exigences strictes en matière de charge de la preuve, qui empêchent certains accusés et avocats de plaider la NCRMD ; l'absence de définition de « *l'unsoundness of mind* » est encore compliquée par l'utilisation fréquente du terme « *insanity* » comme synonyme dans les tribunaux. Les auteurs concluent en préconisant de clarifier les définitions afin d'assurer une plus grande cohérence dans l'interprétation et l'application, bien que cela doive viser à rendre la disposition plus claire, et non plus stricte, car cela irait à l'encontre de l'objectif d'encourager une défense fondée sur la NCRMD.

Not Criminally Responsible in Norway—a Brief Overview of Section 20 and July 22

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Where most nations establish criminal liability using a mixed model, Section 20 of the Norwegian penal code defines a medical model. Amendments over time completely changed the criterion for determining responsibility in Norway. The last to go, the 'psychotic' criterion, was questioned when two external medical experts came up with different diagnoses (i.e., psychotic and non-psychotic) for the accused in the two right-wing terrorist attacks in Oslo and Utøya on 22 July 2011. The subsequent amendment (2020) replaced 'psychotic' with 'severely deviant state of mind', which leaves aspects of the Norwegian criminal justice system's 'medical model' intact while expanding the possibility of criminal liability but widens interpretation/discretion. Knust points out an associated risk regarding the Norwegian principle of legal certainty (i.e., accessibility) and the strict separation (i.e., the limits) of the legislative and judicial power.

Criminal liability at the time of the offence is an essential requirement for criminal responsibility under Norwegian law. Generally speaking, the justifications for criminal responsibility under Norwegian law require that the accused had a choice to act differently and can therefore be held responsible for his or her final choice. Guilt is the guiding principle: only a person who should and could have acted differently can be answerable for their actions, be held criminally responsible, and be punished. Exemption from punishment due to 'not criminally responsible' safeguards does not negate the regulating effect of the criminal justice system, i.e., its ability to make members of the public obey the law through deterrence and norm-building.

Section 20 of the Norwegian Penal Code included specific 'not criminally responsible' conditions and was the subject of numerous amendments over time.

Until 1 October 2020, Section 20, para. 1 stipulated that an "offender is [not accountable and] acquitted of criminal responsibility if, at the time of the act, he/she [was]...

> **(a)** under 15 years of age,
> **(b)** psychotic,
> **(c)** severely mentally disabled, or
> **(d)** suffers from severe impairment of consciousness" [at the time of the offence]. Impairment of consciousness as a result of self-induced intoxication provides no exemption from punishment.

This rule was amended in 2020, changing the criteria and adding scope to intoxication pleas as follows:

> A person who at the time of the act is under age 15 years, is not criminally liable.
>
> The same applies to a person who at the time of the act is unaccountable due to a...
>
> **a**. severely deviant state of mind
> **b**. severely impaired consciousness, or
> **c.** severe mental disability

> When assessing unaccountability pursuant to the second paragraph, emphasis shall be given to the degree of failure in the person's perception of reality and functional capacity.
>
> A person who is temporarily unaccountable as a result of self-induced intoxication shall not be exempt from punishment, unless special reasons so indicate. A person who has a permanent condition as mentioned in the second paragraph a) and who deliberately induces a state of unaccountability, is liable to punishment if special reasons so indicate."

An improved and more accessible understanding of the meaning and logic of the Norwegian approach to the concept of 'not criminally responsible' and the Norwegian criminal justice system's so-called 'medical model'-approach requires a brief overview of the historical development of this concept.

HISTORICAL DEVELOPMENT OF THE NORWEGIAN 'MEDICAL MODEL'

The Norwegian criminal justice system has a long-standing tradition of a 'medical model' that associates insanity exclusively with mental disorder without evaluating whether said disorder is linked to the commission of the crime. Former versions had the criterion of 'sinnssyk' (insane) integrated into the normative framework; this criterion also integrated the categories of 'mental retardation of a high degree' and 'severe cases of autism spectrum disorders' into the regulation (Gröning et al., 2020). It was subsequently changed to the criteria of 'psychotic' and 'mentally retarded to a high degree' until this latter was also removed, leaving 'psychotic' as the only unchanged criterion in Section 20 of the Norwegian Penal Code until 2020.

The old version of section 20 defined criminal insanity as a medical condition taking the form of a 'psychosis', which defines mental illness primarily as a condition that causes a decline in the accused's cognitive capacities (Gröning et al., 2020). This meant that a significantly impaired ability to know what is real and not must have been present at the time of the offence. Thus, to satisfy the definition of 'criminal insanity', an accused needed to meet the diagnosis of a psychotic disorder but not to prove that a significantly impaired perception of reality influenced the commission of the offence.

Most other national criminal justice systems (e.g., Canada and the UK) are based on a 'mixed model', which presupposes the criterion of mental disorder and an associated functional causality requirement. According to the 'mixed model', the mental disorder must have led to a particular functional (cognitive or control) impairment influencing the execution of the offence. By contrast, in Norway, such a mental disorder alone is sufficient to avoid criminal responsibility; a causality between the lack of mental capacity and the crime is unnecessary. This so-called 'medical model' defines insanity exclusively as a mental disorder and does not require any link to the disorder as a condition sine qua non for the commission of the crime.

Another guiding principle of Norway's 'medical model' is the necessity of legal certainty and the separation of the legislative and judicial branches (Gröning et al., 2020). This logic is also mirrored in the former approach, which held that 'medical decisions' on the lack of criminal liability for 'psychotic' medical reasons should be strictly separate from the judge's evaluation (Gröning et al., 2020). Therefore, the evaluation of a defendant's criminal insanity was described in terms of psychiatric science with no legal evaluation. This was also reflected in the terminology and language of medical assessments integrated into the criminal proceedings. As such, the Norwegian 'medical model' was significantly influenced by the interplay between law and medical sciences, whereby a psychiatrist could define criminal insanity using scientific methods in criminal proceedings.

The Norwegian legal system facilitated the integration of different scientific personnel and disciplines into court proceedings: forensic experts are appointed by the courts, not by the parties to the proceeding. Such court-appointed experts provided a diagnosis based on the criteria in the International Classification System for Mental Disorders, the ICD-10 manual, to establish a clinical evaluation of the accused's possible psychotic condition. After this initial ICD-10 based diagnosis, the forensic experts 'translated' this medical/psychiatric assessment into a 'legal' evaluation. This second step was often criticized for its enormous influence on external and 'non-legal' experts in the legal decision-making process.

However, apart from the requirement to use the ICD-10 manual, there were no uniform diagnostic guidelines for Norwegian forensic practice. A key challenge in this context was and still is the lack of a clear and uniform understanding of

what significantly impaired reality testing means in forensic practice. Even though the overall evaluations were supervised by the Norwegian Board of Forensic Medicine, which was willing to contribute to creating a more consistent forensic practice, many inconsistencies remain in the Norwegian justice system. Even if the final decision on whether a defendant is psychotic and should be acquitted of responsibility were up to the court alone to decide, the influence of forensic experts would have a significant impact on legal decision-making involving clinical and diagnostic assessments.

In most cases the courts did not translate the medical assessment into legal language to adjust it to the legal process. Instead, to reach a conclusion, judges tended to examine the assessment more in-depth, primarily in case of disagreement between the invited external medical experts. For example, in 2011, an examination was carried out after experts came to different conclusions about the diagnosis of Anders Breivik. One medical assessment declared him psychotic, while the second assessment attested him as non-psychotic. In the few cases where the judges disagreed with external evaluations, the court's arguments were based on procedural reasoning, the strict standard of proof, and the necessity of proof beyond a reasonable doubt. But such cases were rare exceptions in the Norwegian criminal justice system, whereas an analysis of Norwegian court practice confirmed that the evaluation of criminal insanity in Norwegian court proceedings is mainly at the discretion of forensic experts (Gröning et al., 2020).

All in all, Section 20 of the Norwegian Penal Code had not received much attention until the "July 22 case", concerning a right-wing terrorist attack at Oslo and Utøya on in 2011 triggered a comprehensive and intense discussion about its appropriateness. The main question focused on the criterion of 'psychotic' and whether it provided an adequate delimitation of insanity and gave 'non- legal' experts too much power or control in determining legal questions in criminal proceedings. Against this backdrop, a law commission was set up to examine the need to amend Section 20. This commission (NOU 2014:10) proposed retaining some core ideas of the 'medical model', but in a moderated form to also include conditions equated with psychoses. To counter the immense influence of external non-legal experts in deciding criminal judgments, the law commission (NOU, 2014) proposed changing the role of experts to reduce the direct influence on the court's judgments. The commission had thus argued for a functional differentiation of the medical and legal systems and disciplines, limiting the active participation of experts to the discipline they are familiar with and trained in. This would give judges a clear and independent responsibility in deciding whether to convict or acquit the accused.

Following the law commission's proposal, experts shall only assess the accused according to the ICD-10. The commission's idea was for the external experts to create an evaluation within their specific field of expertise without touching the legal evaluation of Section 20. Additionally, the wording 'psychotic' was deleted in the 2020 amendment, which instead integrated 'severely deviant state of mind' into Section 20; this wording—together with the paragraph stating that in 'assessing unaccountability under the second paragraph, emphasis shall be given to the degree of failure in the person's perception of reality and functional capacity'—yielded a criterion that opens the integration of other, equally severe conditions to psychosis, while retaining psychosis as the central requirement for excusal. Hence, substituting the notion of psychotic with the notion of a severely deviant state of mind preserves certain aspects of the core idea of the Norwegian criminal justice system's 'medical model' (Gröning et al., 2022).

THE INSANITY ASSESSMENT CRITERIA UNDER SECTION 20 OF NORWAY'S PENAL CODE

The insanity assessment criterion of Section 20, para. 2(a) requires a "severely deviant state of mind". In the assessment, according to the third paragraph of Section 20, emphasis shall be given to the degree of failure in the person's perception of reality and functional capacity (Frøberg, 2020). Following the Preparatory Work (Prop. 154 L 2016-2017) produced during the legislative process, the expression ' perception of reality' refers to the perpetrator's ability to realistically assess their relationship with the outside world (i.e., to know that what they were doing was wrong). Functional capacity refers to everyday social and cognitive functions (Frøberg, 2020). Everyday function in this context can be one's ability to fulfil minimum everyday activities. Social function can be viewed as one's ability to participate and interact in social activities and relationships. In contrast, cognitive functions include learning, thinking, remembering, problem-solving, decision-making, and communicating (Prop. 154 L 2016-2017).

The law clarifies that in assessing unaccountability, a strong emphasis must be placed on both (1) a failure in the accused's perception of reality and (2) functional capacity. While lacking one of these two elements may be sufficient to establish unaccountability according to Section 20, the Preparatory Work emphasizes that such a result is not mandatory (Frøberg, 2020). Moreover, this newly established approach is an attempt to allow for the possibility of punishing a relatively well-functioning person with good cognitive functions, including being able to plan and carry out complicated offences (Frøberg, 2020). This means that the reform of Section 20 has expanded rather than reduced the possibility of criminal liability: before the latest reform, a failure in the person's general perception of reality was sufficient to establish unaccountability (Frøberg, 2020). Additionally, Section 20 fails to further define the balance between one's failure to perceive reality and one's functional capacity. The Preparatory Work emphasizes that the starting point for the evaluation is whether it is reasonable and fair to punish the accused, given the person's mental health at the time of the act. But instead of defining 'reasonable' or 'fair', the Preparatory Work lists several factors that should not be emphasized in the insanity assessment, such as the seriousness of the offence, the notion of general prevention and the general sense of justice, or whether it would be most appropriate to subject the perpetrator to imprisonment or compulsory mental health care (Frøberg, 2020).

As the above commentary shows, the new regulation of Section 20 requires further clarification. In sum, the new Section 20 leaves the courts considerable room for interpretation and discretion. Following Groening et al., 2020), however, this can cause immense problems regarding the above- mentioned Norwegian principle of legal certainty and the strict separation (i.e., the limits) of the legislative and judicial power. Nonetheless, this new regulation gives the judiciary much greater discretion and a strong position to decide on the definition of insanity.

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RÉSUMÉ

Not Criminally Responsible in Norway–a Brief Overview of Section 20 and July 22

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Lorsque la plupart des pays établissent la responsabilité pénale selon un modèle mixte, l'article 20 du Code pénal norvégien établit un modèle médical. Les modifications du Code au fil du temps ont complètement changé les critères pour établir la responsabilité en Norvège. Le critère final « psychotique », a été écarté lorsque deux médecins experts externes ont présenté des diagnostics contradictoires (psychotiques et non psychotiques) pour les accusés dans les deux attaques terroristes de droit à Oslo et Utøya le 22 juillet 2011. L'amendement subséquent (2020) a remplacé « psychotique » par « état d'esprit gravement déviant », laissant intacts certains aspects du « modèle médical tout en élargissant la possibilité de la responsabilité pénale ainsi que de l'interprétation et le pouvoir discrétionnaire. Knust souligne un risque associé au principe norvégien de sécurité juridique (accessibilité) et à la séparation stricte (limite) du pouvoir législatif et judiciaire.

Key Lessons Learned About Canadian Forensic Mental Health Service Users: A Focus on Women

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Not Criminally Responsible on Account of Mental Disorder (NCRMD) findings in Canada are rare. Women comprise just 16% of the NCRMD population but warrant specific attention given their unique and complex needs. As such, they are a difficult-to-serve and oft-neglected population, although the literature on NCRMD in Canada reveals notable similarities and differences between women and men. The authors discuss three central areas where knowledge of gender differences among male and female forensic service users is relatively well documented and could inform efforts to optimize clinical services and mental health policies concerning justice-involved women. The authors conclude with milestones achieved and an overview of the clinical implications for gender-sensitive assessment and treatment frameworks.

Over the past decade, the CBC (2014), Global News (2016), and CTV News (2020) have each reported on "Notable Canadian cases where an accused was found not criminally responsible" (The Canadian Press, 2020). These reports all concerned four to eight of the most sensationalistic cases in Canada and included summaries of some of the most gruesome (e.g., Vincent Li) and devastating (e.g., Matthew de Grood, Alan Schoenborn) crimes in recent history where the NCRMD defense was raised, most involving homicides and several including multiple victims. Notably, just two of the 17 unique cases involved a female accused. Here, we dispel pervasive misperceptions about the NCRMD defence, examine the prevalence of female forensic service users, and compare and contrast key characteristics of women and men found NCRMD in Canada.

LESSON 1: NCRMD FINDINGS ARE RARE AND DIVERGE IN IMPORTANT WAYS FROM MEDIA PORTRAYALS AND PUBLIC PERCEPTION

Population-based surveys in Canada and the U.S. demonstrate that public fears of people with major forms of mental illness far outweigh the actual risk of violence posed by such individuals (Seeman et al., 2016). Research also demonstrates considerable frustration and misunderstandings about the NCRMD defence; for example, that it is a standard means of evading responsibility. Further, the media sensationalizes high-profile cases, promoting the notion that the relationship between mental illness is common and causal. Yet in reality, NCRMD findings represent ~1% of all criminal court cases. Despite the media's focus on homicide offenders with mental illness (only a fraction of whom are ultimately found NCRMD), homicides and attempted homicides account for less than 10% of NCRMD offences across the three most populous Canadian provinces (Ontario, Quebec, and British Columbia; Crocker et al., 2015). Women constitute a tiny proportion of this already small group. For example, in a sample of 112 NCRMD homicide offenders in Ontario, just 7 were women (Penney et al., under review).

LESSON 2: FEMALE FORENSIC SERVICE USERS CONSTITUTE A MINORITY OF FORENSIC MENTAL HEALTH PATIENTS, AND INDIGENOUS WOMEN ARE EVEN MORE UNDERREPRESENTED

Worldwide, women constitute a small fraction of the people involved with the criminal justice system (CJS). The United Nations Office on Drugs and Crime (2021) reported that women constitute 7% of persons detained in prison globally. The substantial sex differences in CJS involvement are also evident in the forensic mental health system. In Canada, women have consistently comprised ~15% of individuals found Not Criminally Responsible on

account of Mental Disorder (Nicholls et al., 2015), and this figure has remained stable despite substantial year-over-year increases in the number of forensic admissions generally (Penney et al., 2019). In sum, female forensic service users, much like CJS-involved women generally, comprise a small proportion of individuals in care and as such, they are a difficult-to-serve and often neglected population.

Another consistent finding in the criminological literature pertains to the overrepresentation of Indigenous persons in the Canadian CJS, particularly women. While Indigenous women comprise 5% of the adult population, representing 50% of women with CJS involvement and 40% of women in federal custody. In stark contrast, Indigenous men and (especially) women are substantially under-represented in the forensic mental health system. Penney et al. (2019) found that the proportion of Aboriginal individuals found NCRMD remained stable and low (on average, 2.9% of the total forensic population in Ontario) over 25 years (1987-2012). Although it might seem promising that few Indigenous people are entangled in the forensic system, given that rates of mental illness relevant to an NCRMD defense (e.g., schizophrenia, major affective disorders) are no less common among Indigenous communities in Canada (and may be more prevalent given the impacts of inter-generational trauma), the low rate of Indigenous men and women in the forensic system is concerning (Nicholls et al., in press). Rather, this under- representation (relative to CJS involvement) may reflect discrimination, stigma, and generally ineffective pathways to mental health care for Indigenous people, as well as a gender bias making it unlikely that Indigenous women will come to the attention of forensic mental health services.

LESSON 3: FEMALE FORENSIC SERVICE USERS DIFFER IN ESSENTIAL WAYS FROM THEIR MALE COUNTERPARTS, AND THESE DIFFERENCES HAVE IMPLICATIONS FOR THE PROVISION OF ADEQUATE AND GENDER-SENSITIVE CARE

Despite their under-representation, justice-involved women carry a greater burden of illness and adversity than their male counterparts (King & Smith, 2023). Female forensic service users have higher rates of relational trauma and sexual victimization than their male counterparts; they frequently offend seriously and violently, often against loved ones, resulting in complex and multi-layered challenges for recovery and reintegration (Nicholls et al., 2015).

Although there has been considerable growth in gender-focused research in criminology and forensic psychology, much of what we know about the extent to which risk assessment, treatment, and services need to be gender-specific has been concentrated in correctional samples. Considerably less research has examined women found NCRMD and how they compare to their male counterparts, at least in part because of difficulty accessing sufficiently large samples and the low base rate of many variables (e.g., types of offences, relationships to victims) (e.g., Cheng et al., 2022). The necessity of longitudinal designs to address some of the objectives of forensic services research (e.g., establishing reliable rates of rehospitalization and recidivism), and the substantial economic and research investment to run such large-scale studies, is another major obstacle. What we know about individuals found NCRMD in Canada comes from a few primary sources (e.g., Latimer & Lawrence, 2006; the National Trajectory Project (NTP); Crocker et al., 2015). The NTP represents one of the most extensive samples of men and women found NCRMD to date, and gender-specific analyses were made possible by pooling the number of women from the three most populous Canadian provinces. Since then, a handful of studies have built upon the NTP (Cheng et al., 2022).

GENDER-BASED INSIGHTS: WHAT DO WE KNOW ABOUT MALE AND FEMALE FORENSIC SERVICE USERS?

Social, demographic, and educational differences

Women are generally older at the time of first (lifetime) psychiatric hospitalization and forensic admission, likely reflecting the older age onset of mental illness in women (Hafner, 2003). Despite their greater age, women found NCRMD have significantly fewer prior convictions and less criminal justice involvement than their male counterparts (Nicholls et al., 2015). Further research is needed to clarify the extent to which this reflects “hidden” crime, because women tend to offend against people close to them and within the context of the family home and may therefore be less likely to come to the attention of the police (Nicholls et al., 2015; Hodgins, 2022). Alternatively, this may be evidence of actual gender differences in crime. For example, women are more often found to display a later age onset of offending than men, reflecting, for instance, later onset mental illness and/or gender-specific life circumstances (e.g., poverty – due to women having greater difficulty making livable wages without education than men;

substance use secondary to intimate partner abuse and other forms of trauma (e.g., Salisbury & Van Voorhis, 2009).

Women found NCRMD are also less likely to be homeless, more likely to live independently, more likely to have attained a higher level of education, be married or divorced, and be supported by family or friends before their index offense leading to a forensic admission compared to men. Taken together, these findings indicate that women attain higher levels of social integration and daily living skills than men, providing greater potential for success upon discharge from forensic services.

Clinical and diagnostic differences

Across male and female forensic-service users, researchers have consistently found high rates of schizophrenia and related psychotic disorders, which is a direct reflection of the types of mental disorders and incapacities required for an NCRMD defence (CCC s.16, 1985). At the time of the offence(s) leading to an NCRMD designation, the presence of delusions, hallucinations, or other psychotic symptoms are the same for both men and women. Differences in the diagnostic profiles of men and women found NCRMD are apparent when examining rates of substance use and mood disorders. Both Nicholls et al. (2015) and Penney et al. (2019) found rates of substance use disorders to be higher among men than women, and men were more likely to be under the influence of substances at the time of the offence. Conversely, women were more likely to be diagnosed with a mood or personality disorder (PD) than men (Penney et al, 2019), and women were more likely to have been suicidal at the time of their offence. Penney et al. (2019) also noted higher rates of Borderline personality disorder diagnoses in women than men and emphasized emotional regulation and interpersonal skills as relevant treatment targets for women.

Victimization and trauma

People with serious mental illness and people with CJS involvement are more likely than others in the general population to be socially marginalized and have had involvement with civil mental health services, emergency department visits, poverty, and/or homelessness. These needs often are considered to be secondary to having experienced adversity in childhood and victimization across the lifespan, which can lead to a cascade of events (Nicholls et al., 2023 APA chpt; ACEs literature). In particular, research consistently demonstrates that women with SMI and/or CJS involvement have extensive trauma histories that put them at greater risk for mental health, substance use, physical health and revictimization than the general population and their male counterparts. Furthermore, a growing body of research suggests that forensic clients, specifically women (Stinson et al., 2021) have experienced Adverse Childhood Experiences (ACEs) at higher rates than the general population and have higher-end ACE scores and individual ACE items describing abuse and neglect than men. This suggests that while all justice-involved populations require trauma-informed care, women, and particularly those in forensic settings, present more significant vulnerabilities that necessitate trauma-informed and gender-specific services and interventions.

Physical health and ADLs

As is true for justice-involved women more generally, compared to the general population and men, female forensic patients have unique needs related to physical health. Women with CJS involvement are at considerable risk of physical health concerns, including overdose, sexually transmitted infections, unplanned pregnancies and violence due to substance use, sex trade work and abusive relationships. Their risk of weight gain and obesity (e.g., secondary to medications and being idle in custody) is significantly higher. In addition, they have unique needs around self-care and the activities of daily living (e.g., menstruation, menopause, birth control, pregnancy, childcare) (Nicholls et al, APA chpt).

Offence-related differences

Available evidence has not uncovered significant differences in the nature and severity of the offences leading to NCRMD findings for men or women (Nicholls et al., 2015; Penney et al., 2019). Women found NCRMD have been just as likely as men to perpetrate minor and more serious acts of violence, consistent with the assertion that the gender 'gap' in rates of violence and aggression are substantially smaller among persons with mental illness (Nicholls et al., 2009; Penney et al., 2019). In particular, women perpetrate offences against the person (e.g., assault) at similar rates as men. Sexual offences are relatively rare within this population and virtually never perpetrated by women.

If the offence involves a crime against a person, both men and women found NCRMD are most likely to have offended against family members and individuals known to the accused (e.g., friends,

acquaintances, roommates, co-residents and co-patients) (Nicholls, 2015).

However, women are significantly less likely than men to offend against strangers and significantly more likely to offend against their offspring or partners (Nicholls et al., 2015).

Length of stay under forensic care

Review Boards (RBs) are obligated to maintain jurisdiction over an individual found NCRMD so long as they continue to constitute a "significant threat" as defined by the Canadian Criminal Code. Unlike individuals found criminally responsible, the offence(s) committed by an NCRMD accused may not necessarily correlate with the time spent under Review Board jurisdiction. Women found NCRMD were detained in custody for a shorter period than men and unconditionally discharged by RBs faster than men (Penney et al., 2019). Women also have a lower rate of criminal recidivism after RB discharge than men, similar to women in the general CJS (Nicholls et al., 2015). In sum, women found NCRMD spend less time in hospital, have less time under RB supervision, and yet recidivate at significantly lower rates than men.

CLINICAL IMPLICATIONS FOR GENDER-SENSITIVE ASSESSMENT AND TREATMENT FRAMEWORKS

The necessity of recognizing the unique clinical, health, and risk-related needs of women who come into contact with the CJS has achieved centrality over the last few decades (e.g., Belknap, 2020; de Vogel et al., 2023). Yet, service gaps continue to exist, and the unique characteristics of female forensic-service users explicitly underscore the necessity of gender-sensitive and informed care across the forensic continuum of clinical activities, such as violence-risk assessment, therapeutic and psychoeducational interventions, and generally fostering progress in recovery.

In regard to violence risk assessment, for instance, there is increasing recognition that our current collection of validated risk-assessment instruments may not be adequately adjusted for use with women. Put otherwise, although many of these measures possess acceptable levels of reliability and validity in female samples, they may not yet be fully optimized for risk prediction in women as they are for men. Greater recognition of the potential gender biases in commonly used and/or male-normed risk-assessment tools is needed. The reasoning behind the possibility of bias is that qualitatively different domains of risk are relevant for justice-involved women or that male-validated domains of risk are differentially relevant and/or predictive of future violence in women. Examples of the former include sexual victimization, attachment disruptions and relational trauma (e.g., Brennan & Jackson, 2022; DeHart, 2018).

In the context of group and individual psychotherapeutic interventions, the differential rates of mood and personality disorders in women receiving forensic services are critical to consider. Here, it remains crucial to draw upon the relevant literature to optimize treatment approaches for women (e.g., integrating best practices around trauma-informed care, applying dialectical behaviour therapy principles to treatment groups for women) and avoid a "one-size-fits-all approach to treatment and risk-management approaches. Prioritizing gender-specific and trauma-informed practices over punitive approaches is most productive and consistent with available best-practice recommendations SAMHSA (e.g., Luchenski et al., 2018; Malik et al., 2023). Further, national and international guidelines recommend or require gender-specific services for women (Bangkok Rules; SAMHSA). Although acknowledging female forensic-service users are a heterogeneous population requiring person-centred and individualized care (Nicholls & Goossens, 2017; Trägårdh et al., 2023), research also demonstrates that gender-specific care is consistent with client preferences (Tyagi, 2023) and yields superior outcomes (Bartlett et al., 2015; Malik et al., 2023). Justice-involved women also have unique perspectives on what constitutes personal recovery (Livingston, 2018). For example, sex differences have been noted with respect to the sources of a "meaningful life": for women, this means relationships and attachment; while for men, self-development and accomplishments may be ranked more highly.

Also relevant is research demonstrating that forensic psychiatric patients in Canada and internationally are often idle for the greater part of their day; this seems particularly true for women. Because women comprise such a small proportion of patients, they may be housed with other women at varying levels of security, risk, and need, making it challenging to provide on-unit programming, for example. In addition, resources like access to gymnasiums and green spaces are often less accessible to women (Nicholls, 2019). It has also been observed that justice-involved women are often housed at higher

security levels than is necessary (Blanchette & Gobeil, 2022) given their generally low risk for serious institutional violence.

Prevention with female forensic patients is especially important given offspring are among their most common victims. Moreover, the familial and community ties that are disrupted by a woman's incarceration or forensic admission can worsen existing mental health difficulties and promote the intergenerational transmission of trauma and adversity (Hodgins, 2022). Finally, in light of their frequent victimization, providing better support and psychoeducation to family members caring for a relative with serious mental illness appears critical to reduce rates of intra-familial violence and alleviate the isolation and emotional burden often felt by such caregivers (Rowaert et al., 2018).

Although there is considerable work to be done, arguably, some important milestones have been achieved. Clinicians (e.g., de Vogel, 2023) have begun to translate this body of research into practice guidelines to support the unique needs of female patients in forensic services. Moreover, national and international guidelines recommend or require gender-specific services for women (United Nations on Drugs and crime, 2010, Substance Abuse and Mental Health…., 2019). Preliminary research is promising, demonstrating that gender-specific care is consistent with client preferences (see Vir Tyagi, 2023) and yields superior outcomes (Malik et al., 2023). Nonetheless, few studies have included sufficient numbers of female service users to examine the efficacy of current models of care and identify areas in need of improvement; continued national and international partnerships will be essential to advance practice and improve outcomes (e.g., public safety, quality of life of forensic clients).

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RÉSUMÉ

Key lessons learned about Canadian forensic mental health service users:
A Focus on Women

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Les déterminations de « non criminellement responsable en raison de troubles mentaux » sont rares au Canada. Les femmes représentent seulement 16 % de ces cas mais méritent une attention particulière à cause de leurs besoins uniques et complexes. Bien que la littérature révèle des similitudes et des différences notables, les femmes demeurent difficiles à servir et sont souvent négligées par rapport aux hommes. Les auteurs discutent de trois domaines où la connaissance des différences entre hommes et femmes quant aux services judiciaires est assez bien documentée et pourraient contribuer à l'optimisation des services cliniques et politiques en matière de santé mentale pour les femmes impliquées dans la justice. Les auteurs concluent avec les jalons atteints et un aperçu des implications cliniques des cadres d'évaluation et de traitement sensibles au genre.

Canada Lacks Empirical Data on NCRs: A Special Focus on Assessment and Treatment for Those Found Not Criminally Responsible

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According to Haag's exploration of the complexities of risk assessment and treatment, there are more questions than answers about the NCR accused in Canada. Under the Criminal Code (CCC), a Review Board or Court's paramount concern is determining whether the NCR accused poses a "significant threat" to public safety. As the CCC makes no presumption of dangerousness, rulings of absolute discharge or detention order / conditional discharge must be based on solid evidence, but the CCC offers only cursory definitions of risk levels (e.g., minuscule risk or significant risk and trivial or grave harm). Decision makers such as jurors and/or judges are thus forced to make several operational definitions, a process rendered difficult by the shortcomings of current risk-assessment instruments. As a remedial measure, Haag argues for ensuring forensic psychiatry programs in Canada employ systematic empirical research among the NCR population.

Canada's Not Criminally Responsible (NCR) population is unique within the criminal justice system. According to Section 16 of the Canadian Criminal Code (CCC), a finding of "*Not Criminally Responsible on Account of Mental Disorder*" (NCRMD) is a verdict that occurs when a Court finds an accused to have been suffering from a "disease of the mind", at the time of a criminal offence, that either: (1) rendered them incapable of appreciating the nature and quality of the act or omission or (2) from knowing that said act/omission was wrong (CCC (CCC, 1985). In Canada, NCR verdicts occur in less than one percent of all court findings (Lukassen & Miladinovic, 2014). Not surprisingly, like other aspects of the criminal justice system, there are many more questions than answers regarding the NCR population. This article endeavours to explore some of the questions from the perspective of a scientific practitioner and researcher who works on the *frontlines* with persons who are being assessed for the applicability of Section 16 as it pertains to a particular criminal offence(s) or with those who have been found to be NCR. In particular, this article will highlight issues concerning assessment and treatment for those found to be NCR by the court.

According to Section 672.54 of the CCC, in every hearing involving an NCR accused, a provincial or territorial review board or court must consider if the individual is a significant threat to the public at the hearing. Indeed, in this section of the Code, public safety is noted as the *paramount consideration* of a review board. In the 1999 case of *Winko v. British Columbia* (Forensic Psychiatric Institute), the Supreme Court, by order of section 672.54, ruled that if the NCR accused does not pose a significant threat to the safety of the public, the court or Review Board must order an absolute discharge (Supreme Court of Canada, 1999). The Supreme Court also indicated that, since Section 672.54 did not create

a presumption of dangerousness, there must be evidence of significant risk to the public for a Court or Review Board to maintain control over an NCR accused via a detention order or conditional discharge. The Supreme Court defined significant threat as…

> … a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature…
>
> The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community **and** in the sense that this potential harm must be serious. **A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold.** Finally, the conduct or activity creating the harm must be criminal in nature…
> (bold emphasis added)

Although this description of *significant threat* is a helpful guide, ultimately, a decision maker is still forced to operationally define (1) how much of a risk is required to meet the threshold (i.e., what amount of risk constitutes "minuscule" risk) and (2) what specific crimes and/or behaviours should decision makers be concerned about (i.e., what should one be a risk for?). There is currently a great deal of empirical evidence on the issue of risk assessment for violence and criminality in general (see, e.g., Andrews & Bonta, 2006). Indeed, multiple instruments can inform decision-makers, with varying degrees of accuracy, about the amount of risk someone poses for different categories of recidivism. However, such tools do not specifically answer the question of what amount or kind of risk is adequate to maintain an NCR accused on a warrant. Moreover, there is no way of knowing which crimes in these categories are "trivial" and which are not because this designation is not defined. The issue gets even more complicated when one conflates what is or is not trivial with the outcome of behaviour. For instance, there is little difference in the behaviour of: (1) a distracted driver who changes a radio station while driving and hits a pedestrian and (2) another who practices the same behaviour but does not hit a pedestrian. The logical question flowing from this is whether only potentially adverse outcomes should be predicted or should decision makers be paying attention to behaviour that has the potential to produce a given outcome (e.g., assessment of offence analogue behaviours) even when it is quite conceivable that *no one* might get hurt physically or psychologically if the focus is limited to such behaviour (Mooney & Daffern, 2015)?

Another issue that flows from the word trivial in Winko: To what extent should one consider the possibility of psychological harm? It is reasonably non-controversial to say that multiple people can experience the same event (violent or not) and have different psychological reactions, including varying degrees of psychological harm (Ozer et al., 2003). Should the standard of psychological harm be the average/expected/typical psychological response to a potential stimulus, or should the standard be a potential response of a person who might be more sensitive to the same stimuli? Then there is the more obvious question: How much is known in the victimology literature about the psychological harms of the many crimes noted in the Criminal Code (Dworkin et al., 2021)? The literature shows much more about the effects of some crimes than others. Moreover, when looking at the victim-impact literature, one notes that some of the *least violent crimes* can be the most impactful regarding psychological harm (O'Brien & Burrell, 2020).

In practice, for an NCR accused, it is the author's experience that the above questions are often answered via assessments of their risk for violent recidivism. Is it adequate to predict violent recidivism unto itself, or should there also be a prediction of the severity of any violent recidivism? When considering *Winko*, risk assessment for violence can be said to be essential in any review board hearing, but is such an analysis sufficient? The issue immediately arises that there currently is no empirically derived scale explicitly designed to predict the seriousness of recidivism aside from categorizing a person as having an "x" risk of committing general, violent, and/or sexual recidivism. However, is it broad or narrow categories of crime that the court wishes to prevent? How much statistical confidence is required with a prediction before it is considered acceptable? Over what period is the provincial review board predicting recidivism? Should the review board consider only immediate risk (i.e., less than two years), or moderate-term risk (i.e., two to ten years) and long-term risk (i.e., 10 years to lifetime)? Regarding generalisability, should the norms employed for risk assessment be local provincial norms or would norms from another jurisdiction in Canada be adequate? What about the impact of culture on risk assessment (Haag et al., 2016)?

Regarding risk management versus risk assessment, a common question is how much importance should a review board give the lack of antisocial behaviour while under a warrant? For instance, if someone has been under a detention warrant for ten years and has shown no aggressive behaviour during that time, how much weight should this lack of antisocial behaviour be given? Without empirical data, it may be tempting to suggest that such a lack of antisocial behaviour is evidence that an NCR accused should be given a conditional or absolute discharge. Phrased a different way, should a review board consider a person's current typical behaviour lately (i.e., the last five years) or a person's behaviour over their lifetimes in predicting risk and contemplating an absolute discharge? From an empirical perspective, there is little doubt that historical and dynamic factors assist in predicting risk (Bonta et al., 2014; Campbell et al., 2009). The weight given to behaviour change must be considered empirically; otherwise, one is, in essence, engaging in "clinical overrides" and likely decreasing their predictive accuracy (Cohen et al., 2020; Orton et al., 2021). In essence, unless specific recent changes in behaviour are part of the risk tool being used (Olver et al., 2022; Stockdale et al., 2013), one ought not modify their risk assessment on an ad hoc basis as this will decrease the ability to predict future outcomes.

When assessing someone's risk at multiple points in time, the issues can be even more complex. Take, for example, the NCR accused with the criminogenic risk factor of substance abuse. From a liberal perspective, one might have a situation where a patient decides to repeatedly engage in illicit intoxicant consumption in a controlled environment, but that same patient is never violent while intoxicated. Should the years of an apparent individualized "de-linking" of intoxicant consumption and violence in this patient while incarcerated be considered reason enough to discount this risk variable (i.e., should this be a rationale for a clinical override)? Take a similar question from a conservative lens. Let's say that a patient remains abstinent for a decade while under the warrant. Should this nullify the consideration of substance abuse as a risk factor? The primary response to the above situation must always be from the empirical data instead of ideology; any other method of answering these situations is speculation, even when theoretically informed.

Regarding risk and risk management, another salient question in the NCR population is how well the Canadian NCR system has been set up to address the criminogenic needs of NCR persons. Canadian NCR systems have primarily adopted a traditional psychiatric approach within a forensic context (Eaves et al., 2000). While the author does not discount the need to address psychiatric needs in this population, it is the author's opinion that there is a lack of meaningful programming to address the major criminogenic risk factors in the Canadian NCR population. This creates multiple problems. First, it is a serious ethical problem to identify criminogenic risks in NCR patients for years at a time (i.e., risks are known to all parties involved), detaining someone for an indefinite period under an NCR warrant but failing to provide said person with a meaningful way of reducing said risk (*Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services),[2006] 1 SCR 326*, 2006. Secondly, practically speaking, without systematic programming and research associated with change due to said programming, how would one expect an NCR accused to demonstrate that they have systematically addressed their criminogenic risk factors (Dowden & Andrews, 2000)? There likely are many reasons why this might happen, but the result is still an unethical state of affairs.

Overall, it is hoped that this article provides the reader with a glimpse of the serious/significant need for empirical research on the NCR population in Canada. Moreover, given that issues of individual liberty and the protection of society are at stake, it is argued that rigorous empirical research should be an essential part of any program in forensic psychiatry. Indeed, systematic empirical research is the only meaningful way forward to answering/informing the questions posed by this article.

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RÉSUMÉ

Canada Lacks Empirical Data on NCRs: A Special Focus on Assessment and Treatment for Those Found Not Criminally Responsible

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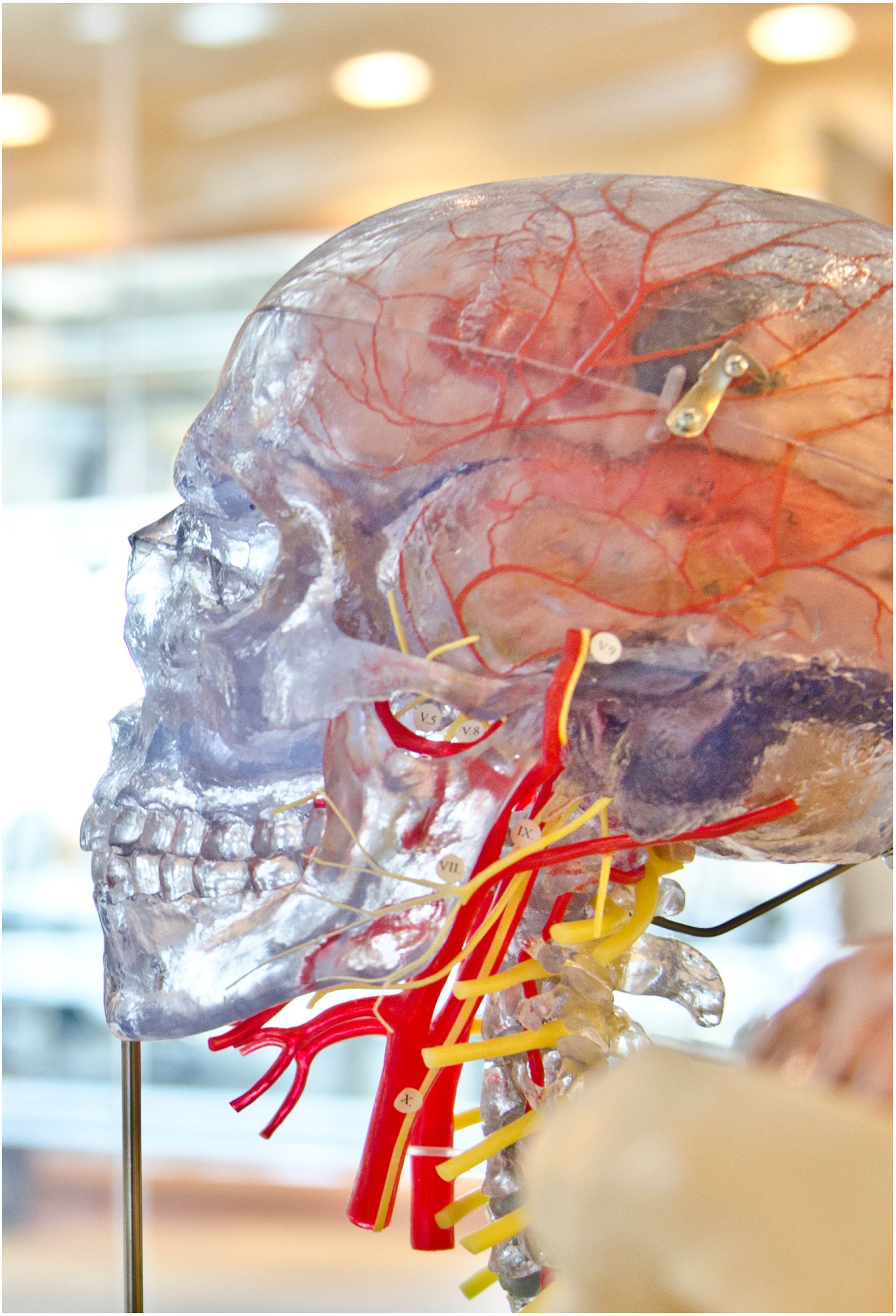
Selon l'exploration de Haag, des complexités quant à l'évaluation et le traitement des risques indique qu'il y a plus de questions que de réponses sur l'accusé NCR au Canada. En vertu du Code criminel (CCC), la principale préoccupation d'une commission ou d'un tribunal est de déterminer si l'accusé NRC constitue une « menace importante » pour la sécurité publique. Comme le Code criminel n'établit aucune présomption de dangerosité, les décisions relatives à l'absolution inconditionnelle ou sous conditions doivent être fondées sur des preuves solides. Pourtant, le Code n'offre que des définitions sommaires des niveaux de risque (p. ex., risque important/minime. préjudice grave/insignifiant). Les décideurs (jurés ou juges) sont obligés de déterminer plusieurs définitions opérationnelles, un processus rendu difficile par les lacunes des outils d'évaluation du risque. À titre de mesure corrective, Haag plaide pour que les programmes de psychiatrie légale au Canada mènent des recherches empiriques systématiques parmi la population NRC.



Mental Health Courts in Australia: Challenges and Key Issues

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This article explores Queensland Australia's approach to mental health and criminality for persons found not guilty by way of mental illness. In Queensland, people with disabilities, including mental health, are overrepresented in the justice system. The state of an accused's mental health (at the time of an offence) is determined by Mental Health Acts and Mental Health Courts established in 2002. The Queensland model is unique in operating at the Supreme Court level. If the court deems an accused was mentally impaired, it diverts them away from the criminal justice system and into appropriate services. Challenges include public perceptions about lack of accountability, debates over length of confinement, and the need for multidisciplinary approaches, individualized responses and relevant facilities. Little research has been conducted into the effectiveness of the Mental Health Courts, making it difficult to establish best practices. While success stories are promising and include reduced recidivism in some cases, further evaluation is required.

INTRODUCTION

Mental health conditions for people in contact with the criminal justice system, particularly incarcerated populations, is substantially higher than for the general population. In the Australian state of Queensland, 35% of prisoners had some form of disability compared to 18.3% in the general population (Queensland Productivity Commission, 2019). For intellectual disabilities, the prevalence is lower, but justice-involved populations are still over-represented. A systematic review conducted by Fazel, Xenitidis, and Powell (2008) found that 0.5-1.5% of prison populations were diagnosed with intellectual disabilities, with a range of 0%-2.8% across studies. In an Australian study based on a large prisoner cohort in the state of New South Wales, approximately 4.3% of inmates were diagnosed with an intellectual disability, around three times that of the general population (Trofimovs, Srasuebkul, Trollor, & Dowse, 2022). Despite the overrepresentation of mental illness, disability, and intellectual disability that characterises prisoner cohorts, diversionary options remain limited in Australia.

In Australia, State/Territory-specific Mental Health Acts introduced in 2002[2] onwards have provisions for dealing with persons found not guilty by way of mental illness[3]. These provisions are typically focused on rehabilitation (e.g., treatment, improving health and wellbeing) and/or public safety (e.g., indefinite detention and review mechanisms related to treatment and detention for persons deemed a threat to the community). Specific mental health courts have been established across Australia to determine the state of mind of people charged with criminal offences. These courts have the power to divert those found to be of 'unsound' mind from the criminal justice system and into appropriate services.

AUSTRALIAN MENTAL HEALTH COURT MODELS

Mental health courts were introduced across Australian States/Territories around 2002 with these courts, in principle, offering treatment rather than punitive sentences to address criminality. They do this by offering tailored responses for accused persons with mental illness. Referral pathways into these courts are similar across Australian jurisdictions, with referrals made by Magistrates, defence lawyers, family members or other relevant

individuals. Except for the state of Queensland, an accused fronting a mental health court must plead guilty to the offence/s in question, have a recognized mental illness, and be eligible for bail before undergoing a diversionary program.
In the Australian state of Queensland, the mental health court operates at the Supreme Court level. The Queensland mental health court is not a sentencing court but instead makes decisions about how to deal with certain people charged with specific offences. For example, the mental health court can make a Forensic Order, Treatment Support Order, or no order (QSAC, 2022).[4] The Queensland mental health court can determine whether an accused person is fit to stand trial, and the level of criminal responsibility that should be established in a criminal court. As the Court is not bound by rules of evidence that govern other courts, the mental health court can consider a wide range of evidence when determining case outcomes. The Queensland mental health court has special inquiry and investigative powers it can use to hear appeals in relation to the lawfulness of a patient's detention in mental health facilities, with many appeals commenced at the request of patients (Mental Health Court, 2021).

In Queensland, dedicated health facilities house clients diagnosed with or suspected of having serious mental illness and who have been convicted or are on remand for serious, indicatable offence/s. Clients may be referred through several avenues, including the mental health court. In the state of Queensland, offenders housed in secure mental health facilities are offered different programs dependent on the level of risk posed, such as medium- and high-security clinical programs. Professionals from these facilities also provide specialist mental health care to adults in correctional centres across Southern Queensland. Clients may remain in these facilities for a short period of time, or indefinitely. In the Australian state of Victoria, for example, patients spend an average of seven years on custodial supervision orders before being released, although the average order length is 16 years (Nobel & Carrick, 2021). Despite extensive processes and resources put in place to respond to criminal acts committed by individuals with mental illness, several challenges remain.

CHALLENGES RELATED TO AUSTRALIAN MENTAL HEALTH COURTS

A key challenge associated with mental health courts in Australia is measuring whether and to what extent they are successful in achieving outcomes that benefit the accused, the victim, and society more broadly. Limited research in this area suggests that mental health courts vary in success. Models that incorporate a diverse court team, intensive monitoring and specially tailored treatment options appear to offer the most promise (Bullard & Thrasher, 2016). These factors align with principles that support effective diversion from the criminal justice system, such as multidisciplinary approaches, clear eligibility criteria for participation, a dedicated court team and judicial monitoring (Australian Institute of Criminology, 2011).

Another challenge associated with mental health courts across Australia is that each state and territory record the use of mental health courts differently, with no clear statistical measures or comparative data capture systems in place. However, a substantial number of referrals are made to Australian mental health courts each year. Data suggest that psychiatric and legal professionals make the majority of these referrals. For example, in the state of Queensland, there were 201 matters filed in the 2020-21 period, with the Chief Psychiatrist (n=91) and legal representatives (n=93) filing the majority (91.5%) (Mental Health Court, 2021).

A more controversial issue with mental health courts is that in some Australian states, laws for the mentally ill can leave accused persons languishing in remand indefinitely. In some cases, accused individuals have spent more time in custody awaiting trial than what they would have served if convicted of the charge.

A recent Australian murder trial saw a Queensland mother deemed not criminally responsible for the death of her infant due to mental illness (Harris, 2022). The Supreme Court verdict found the woman to be suffering from post-natal depression and bipolar disorder at the time of the death. The woman remains in a secure mental health facility awaiting assessment of her case by the Mental Health Review Tribunal. One media outlet reported that the 'unusual loophole' means the mother will no longer stand trial after being charged with the infant's death (Hagan, 2022). This reporting reflects a broader lack of understanding of mental health courts. It suggests there needs to be stronger efforts made to inform the public of their role to curb perceptions of a perceived lack of accountability for individuals deemed unfit to stand trial.

Challenges are also apparent regarding the level and type of impairment a person may display when answering to mental health circumstances in a mental health court. An example of this is when a person is suffering from both a psychological condition and intoxication at the time of an offence. In one example a man killed his wife whilst heavily intoxicated and suffering paranoia (Nathan Peter Greenfield [2017] QMHC 4). The judge found the man had been suffering a mental illness at the time but also had diminished responsibility because he was voluntarily intoxicated. This resulted in a finding that the accused should stand trial for manslaughter as opposed to the more serious charge of murder (Nathan Peter Greenfield [2017] QMHC 4). These examples, and many others, highlight the complex challenges that the mental health courts in Australia face when trying to balance the needs of the accused, community safety, and victims' rights.

IMPACT ON VICTIMS OF CRIME COMMITTED BY A PERSON DEEMED UNFIT TO STAND TRIAL

In Australia, victims of crime are offered some protections under State/Territory specific legislation. This includes financial compensation, access to support services and information on the investigation and prosecution of the offender. Victims are also supported to write or read aloud a victim impact statement as a party to proceedings, except for matters heard in mental health courts. This means that victims are not necessarily able to express the impact of the offence, nor receive information relevant to the status of the investigation, prosecution, or outcomes of any hearings.

A perceived lack of accountability can impact victims with some believing offenders are not held responsible for their crimes (Coghlan & Harden, 2019). Whilst offenders deemed mentally ill may not be sentenced to prison for their crimes, they are often held in forensic mental health facilities, with restrictions placed on their freedom. Another issue is the use of unhelpful terminology that can also impact a victim's ability to recover. For example, if an accused is found 'not guilty' in a general court of law it means the victim of crime cannot be provided with information in relation to the accused. This includes information that may support the victim's sense of safety. This was highlighted in an Australian case where a man was attacked by his business partner. The victim spent years living in fear because his attacker, charged with attempted murder was found not guilty due to being "unsound of mind" at the time of the offence. In this case, the use of 'not guilty' meant that normal supervision practices for serious violent offenders were not commenced. It also meant that people unfamiliar with the case could potentially assume the accused did not commit the crime. Changing the language would allow the victim access to information about decisions related to the offender that could impact ongoing safety (Bridges, 2022).

SUCCESS STORIES

Limited studies suggest individuals accused of criminal offences dealt with in mental health courts can achieve positive outcomes. For example, an evaluation of Victoria's mental health court found that over three-quarters of participants completed the diversion program. This resulted in decreased rates of offending, down 29% in the two years before the program's introduction (Australian Government Productivity Commission, 2021). Similar results were found in both South Australia and Tasmania. The South Australian evaluation found that lower risk offenders were more likely to achieve successful outcomes compared to higher-risk offenders and that program completion was a strong predictor of non-re-offending (Lim & Day, 2014). Research in Tasmania also found a reduction in recidivism among participants, with only 3.8% being apprehended for further offences post-program completion (Lim & Day, 2014). While these successes show promise, further evaluation is required to effectively assess the viability of such models.

CONCLUSION

Mental health court models differ across Australian jurisdictions. Queensland uses a unique model that operates at the Supreme Court level, whereby defendants are not required to enter a guilty plea or be eligible for bail. Limited research has examined the effectiveness of mental health courts in Australia. Challenges that have been identified include issues around monitoring and evaluation, addressing public perceptions about the utility of such models and lack of accountability for offenders who commit serious violent crimes. Additional challenges include determining the most appropriate confinement length, and the Courts' ability to monitor offenders' progress. Despite these challenges, there has been some success in terms of identifying potential best practice principles. These principles include the need for multidisciplinary approaches, individualized responses and facilities that provide the necessary help for offenders. Additional successes identified to date include reductions in recidivism for offenders

dealt with through the mental health court. It would be beneficial to better understand how the Queensland model and those of other Australian jurisdictions compare.

NOTES

1. I would like to acknowledge the guidance and feedback provided by Associate Professor Jesse Cale, School of Criminology and Criminal Justice, Griffith Criminology Institute, Griffith University, and thank Professor John Winterdyk for the opportunity to contribute to the Justice Report.

2. See **https://www.health.qld.gov.au/__data/assets/pdf_file/0028/444583/qld-mh-history.pdf**

3. Under the Queensland Mental Health Act 2016 s10(1) mental illness is defined as a condition characterised by a clinically significant disturbance of thought, mood, perception, or memory.

4. In Queensland the Mental Health Court is comprised of judges of the Supreme Court of Queensland and two assisting psychiatrists. The Mental Health Review Tribunal lists a range of required competencies including legal content, clinical concepts, specialised course content and concise writing skills.

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RÉSUMÉ

Mental Health Courts in Australia: Challenges and Key Issues

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Cet article explore l'approche du Queensland Australie en matière de santé mentale et criminalité des personnes déclarées non coupables pour cause de troubles mentaux. Les personnes handicapées, y compris en santé mentale, sont surreprésentées dans le système judiciaire du Queensland. L'état de santé mentale d'un accusé (au moment de l'infraction) est déterminé par les lois sur la santé mentale et les tribunaux de santé mentale créées en 2002. Queensland est unique car il fonctionne à l'échelle de la Cour suprême. Si le tribunal conclut qu'un accusé souffre de troubles mentaux, il l'écarte du système de justice pénale et l'oriente vers les services appropriés. Les enjeux comprennent les perceptions du public quant à l'absence responsabilité, les débats sur la durée de l'incarcération, le besoin d'approches multidisciplinaires, de réponses individualisées et d'installations adaptées. Peu de recherches ont été menées sur l'efficacité des tribunaux de la santé mentale, rendant l'établissement des meilleures pratiques difficile. Bien que les réussites soient prometteuses, incluant une réduction de la récidive dans certains cas, une évaluation plus approfondie s'impose.

Not Criminally Responsible on Account of Mental Disorder (NCRMD)—A Student Reflection

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Pandila opens up a timely discussion characterizing NCRMD as a long-standing defence plagued by misperceptions in the eyes of victims, lawyers, the accused's family, the media and, ultimately, the public. For example, the wrong perception that most NCRMD defences are related to a violent crime. Throwing conventional understandings of criminality into question and highlighting a need for improved public education about criminal justice, Pandila is calling for research and education aimed at NCRMD reform.

This article is written on the back of an honours thesis on the topic of not criminally responsible on account of mental disorder (NCRMD).

Before completing a degree in Criminal Justice at Mount Royal University, I admittedly had an underappreciation (translation: no appreciation) for the complexities or necessity of NCRMD. During my undergraduate degree, the importance of understanding NCRMD became apparent. This realization came from education.

The legal defence of NCRMD is cloaked in misconception, with even those closest to the defence left questioning the application of NCRMD, which is often referred to in literature as being open to controversy. Here lay the musings of one student on this controversial topic.

A necessary legal defence that has lived within Canadian justice since the late 1800's, the NCRMD defence recognizes a criminal offence committed by those with a mental illness. NCRMD is a legal, not scientific, finding (Baron, 2019). A point of clarity that is, at times, lost.

NCRMD is about real people navigating between the law and a medical diagnosis, and without experience in one or both areas, it is reasonable to see how misconceptions exist. The legal finding of NCRMD operates in parallel with human stories. Stories of mental illness involve individuality, complexity, and human emotion. A one-size-fits-all approach has never worked when dealing with the diverse human population, so how can we expect NCRMD to fit neatly into the pocket of every stakeholder in the process?

The analogy of a ball of yarn comes to mind when reflecting on NCRMD research, with unique pieces of yarn that make up the entirety of the ball. The individual strands include the mentally ill accused, victims, review boards, courts and jurors, lawyers, the public and their perceptions, policymakers and politicians. To unravel this ball of yarn and examine each strand conceptualizes the process required to understand the individual interests of each NCRMD participant and may raise more questions than answers about how to mitigate misconceptions surrounding the defence.

What are common perceptions of NCRMD? The answer to this question will depend upon which perspective you seek.

PERCEPTIONS OF NCRMD

An accused deemed NCRMD (regardless of the offence) may face a longer sentence than if they had stayed in the correctional stream of justice. When adjudicated into the NCRMD (medical) stream, there is no certainty of a release date. A lawyer may be apprehensive about recommending

an NCRMD defence because a disposition under NCRMD evaluates the accused's current mental health rather than the severity of the offence, as posed in the article Proceed with Extreme Caution: The Not Criminally Responsible Defence (Brodsky, 2017). Victims report not feeling heard in the NCRMD process, that the system is flawed, and no one is held accountable for the actions against them or their loved ones. The accused's family may feel their loved one is subject to double jeopardy at annual review board hearings and that negative public perception further stigmatizes mental illness. Stigmatization towards mental illness could pose a barrier for people with mental illness to proactively seek help. There is also the perception that politicians and political interference have impacted the NCRMD and review board process.

One of the loudest (if not most-documented) areas of critique towards NCRMD seems to exist in public perception. Public concerns include the belief that NCRMD is an overused defence, NCRMD puts public safety at risk, and hospitalization is seen as a security measure rather than punishment. Also commonly reported is the NCRMD defence being perceived as a loophole, with people claiming NCRMD to avoid punishment, or seen as a not guilty verdict.

Public comments on NCRMD most commonly reference high-profile, violent cases, yet research reports that violent criminal cases involving mental illness and subsequent NCRMD designations are not in the majority. Perceptions of a correlation between violent crime and NCRMD represent further stigmatization of mental illness.

The intersectionality of public safety, victim recognition and support, and the accused's health is the balancing act of NCRMD. This balance takes the shape of a triangle. Each person and every node of this triangle is vitally important; perceptions carry power. The key may be looking at educating all parties, every corner of the triangle, on NCRMD to see if perceptions can evolve.

INCARCERATION VERSUS TREATMENT

Society has evolved beyond institutionalizing the mentally ill, phrased effectively by former Chief Justice Beverley McLachlin (2010). Suppose we incarcerate rather than hospitalize the mentally ill. In that case, the medical condition that initially places the accused in the justice system will not be assessed and treated as it would in a medical facility.

The accused diagnosed with mental illness would be no further ahead in obtaining the necessary medical intervention required to keep themselves and others safe. Incarceration rather than medical intervention for the mentally ill accused is a recipe for recidivism.

Change will require a paradigm shift in conventional understandings of criminality and justice as well as a more-effective approach to public education.

With the benefit of an education in criminal justice, I see the need for a defence for those with a mental illness. I believe that research and NCRMD reform could be of assistance for this longstanding legal defence.

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RÉSUMÉ

"Not Criminally Responsible on Account of Mental Disorder" (NCRMD) – Student Reflection

CATHARINE PANDILA
Bacc. spécialisé en Criminal Justice, Mount Royal University (Calgary, AB). Actuellement inscrit en maîtrise de Criminal Justice à Arizona State University (E-U).

Catharine Pandila ouvre une discussion opportune qualifiant la non-responsabilité pénale pour cause de troubles mentaux (NCRMD) comme une défense de longue date entachée de fausses perceptions aux yeux des victimes, des avocats, de la famille de l'accusé, des médias et, en fin de compte, du public. Remettant en question les conceptions conventionnelles de la criminalité et soulignant la nécessité d'améliorer l'éducation du public sur la justice pénale, Pandila lance un appel à la recherche et à l'éducation pour réformer le NCRMD.

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